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SUPREME COURT, U.S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

MINOR MOODY,

PETITIONER

V.

NO 74-6632

LOREN DAGGETT, WARDEN,
U.S. Penitentiary
Leavenworth, KS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

SUBMITTED BY:

MINOR MOODY, PRO SE
U.S. Penitentiary
Leavenworth, KS 66048

PREPARED BY:

ROGER LEE WOODS
U.S. Penitentiary
Leavenworth, KS 66048

This Writ is sought to review a decision entered by the Court of Appeals for the Tenth Circuit on May 7, 1975. The decision is not reported, and is attached as Exhibit A.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC 1254(1).

STATEMENT OF THE CASE

Moody received a ten-year federal sentence in February, 1962, served four years and three months and was paroled. In 1971, he was arrested on a new federal charge and was given a new sentence. The U.S. Board of Parole (Board) placed a detainer against him for violation of parole on the 1962 conviction. The Board has refused to execute the detainer. Relying on the case of of Small v Britton, 500 F2d 299, (CA 10, 1974), the District Court dismissed the petition.

On appeal from the District Court, the Court of Appeals denied leave to proceed in forma pauperis, citing Small v Britton, supra, as grounds for the refusal.

ISSUE PRESENTED FOR REVIEW

WHEN A FEDERAL PRISONER IS IN CUSTODY ON ONE SENTENCE AND HAS A PAROLE DETAINER WARRANT FROM AN OLDER FEDERAL PAROLE, MUST THE PAROLE BOARD EXECUTE THE DETAINER WARRANT?

ARGUMENT

In refusing to allow leave to appeal in forma pauperis, the appellate court relied on Small v Britton, 500 F2d 299. Small is at variance with the decision of this Court in Morrisey v Brewer, 408 US 471 (1972); Gagnon v Scarpelli, 411 US 778; and Braden v 30th Judicial Dist Ct of Ky, 93 S Ct 1123 (1973). The appellate court also ignored explicit Congressional command by law, 18 USC 4207, pre-Morrisey law that mandates a prompt parole violation hearing for federal prisoners and federal parolees.

The question to be resolved is whether the U.S. Board of Parole is required to execute a federal parole violation warrant when a parolee received a new federal sentence while on the parole and is then incarcerated in a federal prison. The Tenth Circuit has said a parolee has no right to a prompt hearing, and that the Board may execute the warrant when they please. Small v Britton, supra. The Eighth Circuit, in Cooper v Lockhart, 489 F2d 308 (1973) reached a contrary result in a case involving a detainer from Minnesota on an Arkansas prisoner.

This Court, in both Morrisey v Brewer, supra and Gagnon v Scarpelli, supra, ruled the Due Process Clause applies to revocations of parole and probation.

Further, in deciding when a person is "in custody" for the purpose of habeas corpus and for execution of detainers, the Court held, in Braden v 30th Jud Dist Ct of Ky, supra, that a detainer is "custody" Therefore, when the Board issued a warrant and lodged it against Moody, he was in "custody" for the purpose of habeas corpus, in custody of the Board. Once a parolee is in "custody" of the Board, the rights enumerated in Morrisey, supra, come into play. Recognizing

that whether any procedural protections are due depends on the extent to which an individual would be condemned to suffer grevious loss, the Morrisey Court held a parolee was entitled to:

1. A preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole. Compare, Goldberg v Kelly, 397 US at 267-271.

2. A revocation hearing that must be tendered "within a reasonable time after the parolee is taken into custody," Morrisey, supra, (Emphasis supplied), at which the parolee would be given an opportunity to contest the allegation.

Morrisey is dispositive of the issue. Other courts that have considered the issue in the light of Morrisey have reached results contrary to the Tenth Circuit. The District Court of the District Court in District of Columbia on three occasions has ruled the Board must execute parole violation detainers. See: Sutherland v D.C. Board of Parole, 366 F Supp 270 (1973); Jones v Johnston, 368 F Supp 572; and Fitzgerald v Sigler, 372 F Supp 889. The Sutherland court was faced with a case where the petitioner was on parole and under supervision of the D.C. Board of Parole. While on parole, Sutherland was convicted on a new federal charge and sentenced to ten years. The court said:

> It is firmly established that a parole board secures its jurisdiction over a parolee by issuing a violation warrant before the date of parole expiration...
>
> Plantiff's due process claim, on the other hand, raises a substantial constitutional question. It has long been recognized in this Circuit that "the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch." Shelton v United States Bd of Parole, 388 F2d 567 (1967), supra, at 574. See also Hyser v Reed, 115 US App D.C. 254, 318 F2d 225 (1963). A prompt revocation hearing is essential because delay may result in the loss of essential witnesses or documentary evidence and the continuation of unnecessary incarceration or other limitations on personal liberty.
> At 271.

It is true the Shelton case cited in Sutherland exempted from a revocation hearing all warrants citing a criminal conviction as the reason for revocation, declaring no hearing at all is required in such cases because the fact of violation has already been established by a court. Shelton, supra, at 573. The decision in Morrisey effectively overruled that portion of Shelton. The Sutherland recognized this:

> Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law. Moreover, delay in holding the hearing could substantially prejudice such a parolee. Not only might mitigating evidence be lost during the years of intervening incarceration, see Jenkins v United States, 337 F Supp 1368 (D.Conn., 1972), but the parolee could be arbitrarily deprived of the opportunity to have his reincarceration, if ordered, run concurrently with the remainder of his intervening sentence. The maintenance of a detainer against an inmate whose parole will never actually be revoked has other undesirable effects, triggering an unnecessary loss of prison privileges and hampering rehabilitation by placing the parolee's future into a state of prolonged uncertainty.
>
> . . . Shelton no longer requires a contrary result, because it has been effectively overruled by the Supreme Court's decision in Morrisey v Brewer. . . which held that the Fifth Amendment requires not only a prompt revocation hearing but also an earlier preliminary hearing "near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."
>
> 366 F2d at 272

Even though the petitioners in Morrisey had not been convicted of crimes while on parole, the language in that decision is broad enough to encompass the petitioner. This Court stressed the importance of the revocation hearing as a forum for issues other than the simple fact of parole violation, Morrisey, supra, at 479-480, and stated that the hearing could be simplified by hearing that bars evidence on the parole violation itself if such violation had previously been established by a criminal conviction. Id, at 490. A conviction during parole may alter the content of the revocation hearing, but it does not dispense with the requirement that such a hearing be promptly held. See, Gagnon v Scarpelli, 411 US 778, 790.

In Jones v Johnston, supra, the District Court, relying on Sutherland, ordered dismissal of a detainer warrant where there was a three year period the parole violation warrant of the Board remained unexecuted. To the same effect, is Fitzgerald v Sigler, supra.

The Court should grant certiorari, reverse the decision of the Tenth Circuit, and direct the dismissal of the parole violation warrant.

Respectfully submitted,

Minor Moody

PROOF OF SERVICE

I certify that on this date, I mailed a copy of this Petition to:

Solicitor General

Washington, D.C. 20534

May 13, 1975

ROGER LEE WOODS
Inmate Legal Researcher
U.S. Penitentiary
Leavenworth, KS 66048

D. B. TOLEFREE PAROLE OFFICER
U. S. PENITENTIARY
LEAVENWORTH, KANSAS 66048
AUTHORIZED BY ACT OF JULY
7, 1955, TO ADMINISTER
OATHS (18 U.S.C. 4004).

MARCH TERM - May 7, 1975

FILED
MAY 9 1975
ARTHUR G. JOHNSON, Clerk
By Deputy Clerk

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of Appeals, Tenth Circuit
By Deputy Clerk

MINOR MOODY,

Petitioner-Appellant,

vs. No. 75-1199

LOREN DAGGETT, Warden, U. S. Penitentiary,

Respondent-Appellee.

This matter comes on for consideration of Moody's request for leave to proceed in forma pauperis on appeal from a denial of habeas corpus relief by the United States District Court for the District of Kansas.

Moody was paroled from a federal sentence February 12, 1962. He is currently serving a sentence of ten years imposed on December 6, 1971, by the United States District Court for the District of Arizona. The United States Board of Parole has lodged a detainer against Moody based on a parole violator's warrant from his first sentence. The Board plans to execute the warrant when Moody is released from his 1971 sentence. Moody alleges that failure of the Board to execute the warrant and provide him with a parole revocation hearing violates the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972.)

Moody's claim is clearly without merit under our holding in Small v. Britton, 500 F.2d 299 (10th Cir. 1974). Accordingly, leave to proceed in forma pauperis is denied.

Ex A

Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

BEST COPY AVAILABLE

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JUN 2 1975
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RECEIVED
MAY 19 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA

STATE OF KANSAS

COUNTY OF LEAVENWORTH

AFFIDAVIT IN FORMA PAUPERIS----------

Having appeared before me in person, and having been first duly sworn

Minor Moody, deposes and says:

THAT HE IS A CITIZEN OF THE UNITED STATES OF AMERICA; THAT HE IS OVER THE AGE OF TWENTY - ONE (21) YEARS; THAT HE IS THE PETITIONER IN THE ABOVE ENTITLED CAUSE, THAT HE FEELS HE HAS A GOOD AND JUST CAUSE OF ACTION AGAINST THE NAMED RESPONDENTS, THAT HE IS AN INDIGENT PERSON WITH PERSONAL FUNDS IN THE AMOUNT OF 14.24; AND THAT HE IS THEREFORE UNABLE TO PAY THE COSTS OF PROSECUTING THE ABOVE ACTION AND REQUESTS TO BE PERMITTED TO PROCEED IN FORMA PAUPERIS ON TYPE-WRITTEN BRIEFS AND RECORDS. (Title 28 U.S.C., Section 1915.)

X Minor Moody
Signature of Affiant
Box Number

SUBSCRIBED AND SWORN TO BEFORE ME THIS

13 DAY OF May (Month), 1975 (Year)

[illegible], Notary Public.

My Commission Expires: (Month) (Day) (Year)

D. B. TOLEFREE PAROLE OFFICER
U. S. PENITENTIARY
LEAVENWORTH, KANSAS 66048
AUTHORIZED BY ACT OF JULY 7, 1955, TO ADMINISTER OATHS (18-U.S.C. 4004).

LKC 163

Supreme Court, U. S.
FILED
MAY 27 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY,

Petitioner,

—*v.*—

LOREN DAGGETT, Warden,
United States Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 2, 1975
CERTIORARI GRANTED MARCH 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY,

Petitioner,

—*v.*—

LOREN DAGGETT, Warden,
United States Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS
1975	
Jan 22	Petition for writ of habeas corpus w/supplement copy to U. S. Attorney $5.00 PAID
Jan 29	MEMORANDUM AND ORDER filed and entered O'Connor—J ORDERED that this action be dismissed. (It is the rule in this Circuit that a parole revocation hearing is not required until the parole violator warrant has been executed. The parole board is under no obligation to execute the warrant inasmuch as petitioner has been in custody on his 1971 manslaughter sentence since the time the warrant was issued and filed as a detainer against him.) copies: petr and U. S. Attorney
Jan 29	Judgment on decision by the court denying relief and dismissing action filed and entered Clerk copies: petr and U. S. Attorney JS 6 card made
Feb 18	Notice of appeal $5.00 PAID copies: petr; Mr. Robert J. Roth, U.S. Atty; Clerk, U.S Court of Appeals, 10th Circuit w/copy of docket entries
Mar 14	Original record on appeal transmitted to Clerk, U.S. Court of Appeals, 10th Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PERSONS IN FEDERAL CUSTODY

Case No. 75-28-C3
(To be supplied by
the Clerk of the
District Court)

[Filed Jan. 22, 1975, Arthur G. Johnson, Clerk
By Elizabeth * * *, Deputy]

[Filing Fee Paid, Arthur G. Johnson, Clerk
By Elizabeth * * *, Deputy]

MINOR MOODY
Full name of petitioner

00901-156
Prison number

vs.

LOREN DAGGETT, Warden
Name of respondent

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and two copies* shall be mailed to the Clerk of the District Court for the District of Kansas, Topeka, Kansas.

PETITION

1. Place of detention—USP LK

2. Name and location of court which imposed sentence US Dist Ct. Arizona

3. The case number and the offense or offenses for which sentence was imposed:

(a) CR 71-596 Manslaughter 18 USC 115 3, 1112, 111
(b) .....
(c) .....

4. The date upon which sentence was imposed and the terms of the sentence:

(a) 12-6-71 10 years
(b) .....
(c) .....

5. Check whether a finding of guilty was made after a plea of

(a) guilty .....; or
(b) not guilty .....; or
(c) nolo contendere X

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury .....; or
(b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? NO

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i. .....
ii. .....
iii. .....

(b) the result in each such court to which you appealed and the date of such result:

i. .....
ii. .....
iii. .....

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See Attached
(b)
(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See Attached
(b)
(c)

11. Have you filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction?

NO

12. If you answered "yes" to (11), list with respect to each petition, motion or application

(a) the specific nature thereof:

i. .....
ii. .....
iii. .....

(b) the name and location of the court in which each was filed:

i. .....
ii. .....
iii. .....

(c) the disposition thereof and the date of such disposition:

i. .....
ii. .....
iii. .....

(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. .....
ii. .....
iii. .....

13. If you did not file a motion under Section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

(a) See Attached
(b)
(c)

14. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus motion under Section 2255 of Title 28, United States Code, or any other petition, motion or application? NO

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. .....
ii. .....
iii. .....

(b) the proceedings in which each ground was raised:

i. .....
ii. .....
iii. .....

16. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of such sentence? .....

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? .....

17. If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you:

i. Public Defender Phoenix, Arizona
ii. .....
iii. .....

(b) the proceedings at which each such attorney represented you:

i. All
ii. .....
iii. .....

(c) was said counsel

i. appointed by the court? X; or
ii. one of your own choosing? .....

18. If your petition is based upon the trial court's refusing you counsel, attach the transcript of the proceedings which supports your allegation.

19. If your petition is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

(a)

(b)

(c)

20. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? .....

/s/ Minor Moody
Signature of Petitioner

STATE OF KANSAS)
) ss
COUNTY OF LEAVENWORTH)

I, Minor Moody being first duly sworn under my oath depose and say that I have subscribed to the foregoing petition, that I know the contents thereof; and that the matters and allegations therein set forth are true.

/s/ Minor Moody
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 13 day of Jan., 1974.

/s/ D. B. Self
Notary Public

My commission expires:

_____
(month) (day) (year)

D. B. Tolefree Parole Officer
U.S. Penitentiary
Leavenworth, Kansas 66048
Authorized by Act of July
7, 1955, to Administer
Oaths (18-U.S.C. 4004).

U. S. DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA, KANSAS

No: ———

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, Warden, RESPONDENT

———

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

1. Moody does not attack the present sentence he is serving. There is currently an outstanding parole violation warrant lodged by the U. S. Board of Parole (Board). The warrant concerns a federal sentence imposed on February 12, 1962. Moody served four years and three months on a ten-year sentence and was paroled. When he was arrested and sentenced on the present sentence, the Board lodged a detainer with the Warden.

2. During 1972, Moody asked the Board to execute the detainer warrant. The Board, in a letter dated October 18, 1972, refused to do so, saying:

> "The Board has indicated it intends to take you into custody as a federal parole violator at such time as you are released from the sentence for which you are now confined."

Signed:
James R. Pace
Per: Stanley B. Kruger

ARGUMENT

Under *Morrisey* v. *Brewer*, 408 U.S. 471, prompt parole violation hearings are required. Issuance of a parole violator warrant requires a diligent, good faith attempt to determine the validity of charges outlined in the warrant.

Over three years have elapsed since Moody was sentenced to the custody of the Attorney General. The only remedy for such a delay is dismissal of the warrant. See: *Sutherland* v. *D. C. Board of Parole*, 366 F. Supp. 270 (1973) (D.C.); *Fitzgerald* v. *Sigler*, 372 F. Supp. 890 (D.C.) 1974; *James* v. *Johnston*, 368 F. Supp. 571 (1974) (D.C.).

Respectfully submitted,

/s/ Minor Moody

CERTIFICATE

I do hereby certify, under the penalties of perjury, that all information contained herein is true.

/s/ Minor Moody

Sworn to and subscribed before me this 13 day of January, 1975.

/s/ D. B. Tolefree
D. B. TOLEFREE
Parole Officer
U. S. Penitentiary
Leavenworth, Kansas 66048
Authorized By Act of July 7, 1975 to Administer Oaths (18-U.S.C. 4004).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Filed Jan. 29, 1975, Arthur G. Johnson, Clerk, /s/ [Illegible], Deputy]

Civil Action No. 75-28-C3

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, Warden, RESPONDENT

MEMORANDUM AND ORDER

Petitioner has filed with the clerk a petition for writ of habeas corpus. Petitioner is presently confined at the United States Penitentiary at Leavenworth, Kansas pursuant to a sentence imposed on December 6, 1971 by the United States District Court for the District of Arizona after a plea of *nolo contendere* to the offense of manslaughter. Petitioner does not attack his present sentence.

Petitioner contends that he has been denied a speedy parole revocation hearing as required by *Morrisey* v. *Brewer*, 408 U.S. 471 (1972). Petitioner acknowledges that on February 12, 1962, he received a ten-year federal sentence for an unstated offense. He served four years and three months on that sentence and was then paroled. Moody further acknowledges that when he was arrested and sentenced on the present sentence, the Board of Parole filed a detainer with the Warden of the United States Penitentiary. The Board has refused to execute the parole violator warrant which is serving as the basis of its detainer. It is the rule in this Circuit that a parole revocation hearing is not required until the parole violator warrant has been executed. The parole board is under no obligation to execute the warrant inasmuch as petitioner has been in custody on his 1971 manslaughter sentence since the time the warrant was issued and filed

as a detainer against him. See *Small* v. *Britton*, 500 F. 2d 299 (10th Cir. 1974), and cases cited therein.

Accordingly,

IT IS ORDERED that this action be dismissed, and that the clerk transmit copies of this Memorandum and Order to the petitioner and the Office of the United States Attorney.

Dated this 27 day of January, 1975, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed Jan. 29, 1975, Arthur G. Johnson, Clerk,
By /s/ [Illegible], Deputy]

Civil Action File No. 75-28-C3

MINOR MOODY, PETITIONER

vs.

LOREN DAGGETT, Warden, RESPONDENT

JUDGMENT

This action came on before the Court, Honorable Earl E. O'Connor, United States District Judge, presiding, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that all relief be denied and the action be, and it is hereby, dismissed.

Dated at Topeka, Kansas, this 29th day of January, 1975.

Entered in the docket 1-29-75

ARTHUR G. JOHNSON
Clerk of Court

By /s/ [Illegible]
Deputy

IN THE UNITED STATES DISTRICT COURT
TOPEKA, KANSAS

[Filed Feb. 18, 1975, Arthur G. Johnson, Clerk,
By /s/ [Illegible], Deputy]

No. 75-28-C3

MINOR MOODY

vs.

LOREN DAGGETT, Warden

NOTICE OF APPEAL

Take notice that Minor Moody, hereby appeals from the Order of January 29, 1975; to the Court of Appeals.

Five Dollar ($5.00) filing fee follows.

/s/ Minor Moody
MINOR MOODY, Pro se

MARCH TERM—May 7, 1975

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

[Filed May 9, 1975, Arthur G. Johnson, Clerk,
By /s/ [Illegible], Deputy]

No. 75-1199

MINOR MOODY, PETITIONER-APPELLANT

vs.

LOREN DAGGETT, Warden, U. S. Penitentiary,
RESPONDENT-APPELLEE

This matter comes on for consideration of Moody's request for leave to proceed in forma pauperis on appeal from a denial of habeas corpus relief by the United States District Court for the District of Kansas.

Moody was paroled from a federal sentence February 12, 1962. He is currently serving a sentence of ten years imposed on December 6, 1971, by the United States District Court for the District of Arizona. The United States Board of Parole has lodged a detainer against Moody based on a parole violator's warrant from his first sentence. The Board plans to execute the warrant when Moody is released from his 1971 sentence. Moody alleges that failure of the Board to execute the warrant and provide him with a parole revocation hearing violates the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972).

Moody's claim is clearly without merit under our holding in Small v. Britton, 500 F.2d 299 (10th Cir. 1974).

Accordingly, leave to proceed in forma pauperis is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

HOWARD K. PHILLIPS
Clerk, U. S. Court of Appeals
Tenth Circuit

/s/ [Illegible]
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 1, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 208180 259

Supreme Court, U. S.
FILED
OCT 17 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-6632 and 75-5215

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, WARDEN

ASHLEY GADDY, PETITIONER

v.

GEORGE MICHAEL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FOURTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, WARDEN

No. 75-5215

ASHLEY GADDY, PETITIONER

v.

GEORGE MICHAEL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FOURTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 74-6632 (Moody) is unreported. The opinion of the court of appeals in No. 75-5215 (Gaddy) is reported at 519 F.2d 669.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1975 in Moody and on July 7, 1975 in Gaddy. The petition was filed on June 2, 1975 in Moody and on August 5, 1975 in Gaddy. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires the Parole Board to hold an oral parole revocation hearing before it can revoke the parole of a parolee convicted of an offense committed while on parole.

2. If such a hearing must be held, whether it can be deferred until the parolee has completed serving the sentence imposed for the intervening crime.

3. If a hearing must be held promptly following conviction for the intervening crime, whether the parolee is entitled to immunity from revocation because of delay in holding his hearing.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

18 U.S.C. 4205 provides:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

18 U.S.C. 4207 provides:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

The United States Parole Board's regulation relating to detainers 28 C.F.R. 2.53 provides:

> (a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.
>
> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand;
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision, thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;
>
> (4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.
>
> (c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual review relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

STATEMENT

1. No. 74-6632.

On February 12, 1962, petitioner Moody was sentenced in the United States District Court for the District of Arizona to a term of ten years' imprisonment. He was paroled on April 11, 1966. On December 6, 1971 petitioner was convicted and sentenced in the

United States District Court for the District of Arizona to a term of ten years' imprisonment upon his plea of guilty to an indictment charging manslaughter and second degree murder. Petitioner was incarcerated at the United States Penitentiary at Leavenworth, Kansas; the Board of Parole promptly issued a parole violator warrant, which it lodged against petitioner as a detainer. Petitioner asked the Board to execute the parole violator warrant, alleging that any additional imprisonment for violation of the terms of his parole should run concurrently with the 1971 sentence he is now serving. The Board responded that it did not desire to take petitioner into its custody until he had been released from his 1971 manslaughter and murder sentence. The Board restated its intention in April 1974 following the yearly review of petitioner's case provided by the Board's regulations (28 C.F.R. 2.53(a)).

On July 22, 1975, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, seeking to compel the United States Board of Parole to dismiss the parole violator warrant on the grounds that the delay in holding the revocation hearing had deprived him due process of law. The district court dismissed petitioner's action, and the court of appeals affirmed (Pet. App. A), following its earlier opinion in Small v. Britton, 500 F.2d 299 (C.A. 10), which held that the Due Process Clause does not require a hearing until the parole violator warrant is executed.

2. No. 75-5215.

On April 3, 1970, petitioner Gaddy was sentenced to a term of four years' imprisonment for uttering counterfeit obligations of the United States. On October 17, 1972, petitioner was released (by virtue of accumulated "good time") pursuant to 18 U.S.C. 4163; under 18 U.S.C. 4164 a prisoner so released is treated as a parolee until the expiration of his maximum sentence. Petitioner

had a maximum of 423 days remaining to be served on his sentence at the time of his release.

Less than five months later he was arrested and incarcerated in North Carolina for passing forged checks. He was convicted on state charges on March 14 and 15, 1973. On April 10, 1973, a parole violator warrant was issued by the United States Board of Parole and lodged against him as a detainer. Petitioner was notified that the detainer had been filed.[1/] On April 17, 1973, he was advised that he had a right to submit information to the Board of Parole relative to the parole violation. He made no attempt to avail himself of this administrative remedy (Pet. App. 21). On May 28, 1974, North Carolina released petitioner to the custody of the United States. The Board of Parole executed the warrant; petitioner received a hearing before an officer of the United States Probation Office in Charlotte, North Carolina, who found probable cause for revoking parole. Petitioner was subsequently transferred to the federal penitentiary at Danbury, Connecticut. On August 30, 1974, a parole revocation hearing was conducted at that prison, and petitioner's parole was revoked.

On August 14, 1974, the United States District Court for the District of North Carolina issued a memorandum and opinion (Pet. App.) in response to a December 17, 1973 pro se "Complaint for Declaratory Judgment and Injunctive Relief" in which petitioner had claimed that he should have been afforded a parole revocation hearing in 1973. The district court held that, even where the parolee had been convicted of an intervening offense, Morrissey v. Brewer, 408 U.S. 471, requires the Board to conduct its revocation hearing and render a decision within sixty days after the issuance of the parole violator warrant. The court of appeals reversed, holding that since the delay of the hearing to allow petitioner

---

1/ Petitioner was convicted on other North Carolina charges on April 20, 1973, and in May 1973.

(5)

to serve his intervening sentence was not unreasonable, and petitioner had suffered no prejudice due to the delay, he was not entitled to any relief.

DISCUSSION

The issues presented in these cases are the subject of major disagreement among the circuits. Their resolution, either by this Court or by Congress, is necessary in order to relieve the Board of Parole from the conflicting directives from the courts of appeals regarding both the manner in which it may make decisions to revoke the parole when the parolee has been convicted of a crime committed while on parole and the remedy when it has neglected to act with sufficient dispatch. Until the Board's obligations are clarified, it will be confronted with numerous judicial proceedings and will face the possibility that some individuals may escape revocation altogether although in the Board's judgment the interests of society require revocation.

1. The Eighth Circuit has held in Cleveland v. Ciccone, 517 F.2d 1082, that a parole revocation hearing must be held promptly after a detainer has been filed against a parolee in state or federal custody on an intervening charge or conviction. The court apparently held that the hearing should follow promptly upon issuance of the violator warrant, whether or not the warrant is lodged as a detainer. However, concluding that its decision, like that of Morrissey itself, should not be applied retroactively, the court of appeals declined to quash the warrants and simply ordered the Board to hold prompt hearings.[2/] The Board is complying with this decision within the States making up the jurisdiction of the Eighth Circuit.

2/ Other panels of the Eighth Circuit have followed a similar course, ordering the Board to hold prompt hearings but not ordering the Board to release the parole violator. See United States ex rel. Martin v. Saxbe, No. 75-1311, decided July 9, 1975; United States ex rel. Williams v. Saxbe, No. 74-1999, decided July 24, 1975.

(6)

The Seventh Circuit has adopted a different approach. United States ex rel. Hahn v. Revis, No. 74-1057, decided July 25, 1975, held that the Board must offer the parolee a hearing within three months "after the parolee's conviction establishes the parole violation" (slip op. 8-9, n. 5). The date on which a violator warrant is issued apparently is not pertinent to this analysis.[3/] After the hearing, the court held, the Board could decide to withdraw the warrant, execute the warrant (and so make the term for parole violation run concurrently with the term for the intervening offense), or defer execution of the warrant (thereby making the term for parole violation run consecutively to the term for the intervening offense).[4/] The court expressly rejected the Board's argument that a prompt "dispositional review," without an oral hearing, adequately protects the parolee's legitimate interests. Because the Board had not furnished the parolee with a prompt personal hearing, the court ordered him released from custody.

The Third and Fourth Circuits take still another position. In petitioner Gaddy's case the Fourth Circuit adopted an ad hoc balancing approach similar to that followed in speedy-trial cases (see Pet. No. 75-5215 App. 7-8); the court held that because delay may help as well as harm a parole violator, the mere presence of delay, in the absence of demonstrable prejudice, is not a ground for permitting a parole violator to avoid serving the remainder of his term. See also Orr v. Saxbe, C.A. 3, No. 75-1042, 75-5594

3/ The court declined to express an opinion on the proper timing of a hearing should the parolee be acquitted of the charge of an intervening crime. See In re Valrie, 12 Cal. 3d 139, 115 Cal. Rptr. 340, 523 P.2d 812, certiorari denied sub nom. Procunier v. Valrie, 420 U.S. 938 (hearing should be held promptly after arrest for an intervening offense).

4/ The Fourth Circuit has held in Gaddy that the Board possesses this full menu of choices. The Eighth Circuit apparently assumed in Cleveland, however, that the Board must either withdraw or execute the warrant promptly after holding the hearing. Such a result effectively deprives the Board of any meaningful sanction for parole violations that also constitute independent crimes for which the parolee is convicted and imprisoned.

(7)

decided June 17, 1975, affirming per curiam, M.D. Pa., Civ. No. 74-341, decided November 27, 1974, holding that a parole violator must demonstrate prejudice amounting to "grievous loss" in order to be entitled to relief.

Finally, the Fifth, Sixth, and Tenth Circuits have held that Morrissey is inapplicable where there has been an intervening offense, and that the Constitution does not require a revocation hearing until the parole violator warrant is executed. Cook v. Attorney General, 488 F.2d 667 (C.A. 5), certiorari denied, 419 U.S. 848; Colangelo v. Board of Parole, C.A. 6, No. 75-1279, decided July 16, 1975; Small v. Britton, 500 F.2d 299 (C.A. 10).[5/] We submit that Cook, Colangelo and Small have adopted the correct approach.

2. A parolee who is convicted of a crime while on parole is not entitled to a hearing at any time if the Board decides to revoke his parole because of that conviction. The Fifth Amendment provides that no person shall be deprived of "liberty" or "property" without due process of law. As we have argued in our brief amicus curiae in Weinstein v. Bradford, No. 74-1287, the decision whether to grant or deny parole is discretionary; no set of facts establishes an entitlement to be granted parole and, therefore, an applicant for parole is not entitled to a hearing at which he could attempt to prove particular facts.[6/] See Board of Regents v. Roth, 408 U.S. 564. See also Arnett v. Kennedy, 416 U.S. 134, 181 (White, J., concurring and dissenting):

5/ The questions presented by the instant cases also are presented in cases pending in two other courts of appeals. See Jones v. Johnston, 368 F. Supp. 579 (D.D.C.), appeal pending, C.A.D.C., No. 74-1424; Byrd v. Sigler, 372 F. Supp. 889 (D.D.C.), appeal pending, C.A.D.C. No. 74-1517; Murine v. Sigler, appeal pending, C.A. 9, No. 74-2541; Reese v. United States Board of Parole, appeal pending, C.A. 9, No. 74-2418.

6/ Copies of our brief in Weinstein are being furnished to petitioners.

(8)

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

The same analysis is applicable when parole is revoked because of conviction for a crime committed while on parole. Morrissey held that, because parole is a form of "liberty" subject to defeasance only if the government can demonstrate that the parolee violated the conditions of his parole, a hearing is required so that the parolee can present his version of disputed facts relevant to whether he has violated those conditions. But once it has been established that the parolee violated the conditions of his parole, the factual basis for revocation of parole has been established, and the parole authorities are left with a purely discretionary determination whether to revoke parole or not to revoke it; no fact or set of facts that the parolee can prove will entitle him not to have his parole revoked.

A parolee's conviction for a crime while on parole conclusively establishes that he has violated the conditions of his parole. As the Court noted in Morrissey, supra, 408 U.S. at 490, a parolee convicted of an intervening offense "[o]bviously * * * cannot relitigate issues determined against him in other forums, as in the situation presented when a revocation is based on conviction of another crime." And, as Morrissey held when remanding for a hearing, if the record on remand established that the parolees had violated the conditions of their paroles, "that would end the matter" (ibid.). The Court did not hold in Morrissey that the parolee must be accorded a hearing on whether the parole board should exercise its discretion not to revoke the parole of one who had violated the conditions of his parole.[7/] Once the violation of

---

7/ The Court indicated in Morrissey (408 U.S. at 480, 483-484) that personal hearings on parole revocation would be useful because, among other things, they may provide information helpful to the parole authorities in exercising their discretion whether or not to revoke

(Footnote continued on next page)

the conditions of parole has been established--by a confession of the alleged violator, by a conviction for an intervening crime, or by evidence introduced at a Morrissey hearing--the parole authorities are entitled to revoke parole without further hearings.[8/] If the Board is under no constitutional obligation to hold any hearing, a fortiori it is under no obligation to hold a prompt hearing.

3. Even if a hearing must be provided at some point, it does not follow that this hearing must be provided promptly after the issuance of the violator warrant (as the Eighth Circuit held) or the conviction for the intervening crime (as the Seventh Circuit held). The parolee is not deprived of any "liberty" by the Board until the warrant is executed. Although an imprisoned parole violator surely has been deprived of his liberty, that deprivation was occasioned by his arrest and conviction for the intervening crime, not by the issuance of the Board's parole violator warrant. The Board's decision to revoke or not to revoke, or even the absence of a decision, will not affect the parolee's liberty until the conclusion of the intervening sentence. Only then is the parole violator "deprived" of his "liberty" by the Board, and only then could the Constitution require a hearing. Cf. Anderson v. Corrall, 263 U.S. 193, 196.

(Footnote continued from preceding page)

the parole of one who has violated the conditions of his parole. We do not dispute that this is frequently so, and the Parole Board often holds hearings for this purpose alone. Taken in context, however, the Court's observation simply points to certain potential advantages of hearings and does not hold that the Constitution requires a hearing when the fact of parole violation has been established by other means.

8/ Accord, Shadbolt v. Michigan Department of Corrections, 386 Mich. 232, 235-236. See also Swift v. Ciccone, 477 F.2d 577 (C.A. 8) (no need for a hearing to forfeit good time after a conviction for crime or revocation of parole).

It may be that 18 U.S.C. 4207 requires a hearing before the Board can exercise its discretion to revoke parole, even if its action is based upon an intervening conviction. That statute, however, comes into play only after the Board has "retaken" an individual by executing the violator warrant; it does not compel the Board to provide a prompt hearing during the time a parole violator is confined pursuant to the intervening conviction and before the Board decides whether to execute the warrant.

4. To the extent the Constitution requires the Board to consider prior to the expiration of the intervening sentence whether to revoke parole, we submit that the Board's current procedures satisfy the constitutional command. Under 28 C.F.R. 2.53, a parolee convicted and imprisoned for an intervening crime may petition the Board to execute or dismiss the outstanding violator warrant. He may also submit evidence in support of his claim. Most decisions can be made adequately at this point, without the need for an oral hearing. If the Board concludes that additional evidence would be helpful in considering the application, however, the Regional Director designates a hearing examiner to conduct a personal interview of the parolee. In all cases the Board reviews the parolee's status annually.

This administrative procedure strikes a proper balance between the legitimate interests of the parolee and those of the administrative system. Any person who can demonstrate the need for an immediate hearing is entitled to receive such a hearing, while hearings for other violators are deferred until the conclusion of the intervening term, when the Board will have access to new information about the violator's conduct during his imprisonment that may be crucial to the Board's decision whether to revoke parole or to dismiss the warrant.[9/] As Morrissey held (408 U.S. at 481), "due process is flexible and calls for such procedural protections as the particular situation demands." The Board's rules are fair and provide more than ample protection for the interests of those few prisoners whose presentation to the Board would be prejudiced if a full oral hearing were delayed until the expiration of their intervening sentence.

9/ Ordinarily, when the parole violation is of the gravity of commission of a new crime leading to imposition of a sentence of imprisonment, an immediate hearing could sensibly lead to no result other than revocation consecutive to the intervening sentence. A hearing thus is far more likely to be useful in aiding the Board in the exercise of its discretion if it occurs after service of the intervening sentence.

(11)

5. The questions presented by these three petitions are of substantial practical importance to the operation of the Board. We have been informed that the Board revokes the parole of approximately 1000 persons yearly because of their convictions for crimes committed while on parole. The Board estimates that, if required to hold revocation hearings within 60 days of the intervening conviction, it would conduct approximately 800 hearings annually in state and local prisons, many of which are far from federal prisons and from any office of the Board. And, because the Board believes that the prisoner's conduct during the imprisonment for the intervening conviction is an important factor in deciding whether parole should be revoked, the Board would most likely hold additional hearings for each of these violators when the intervening sentence is completed. We therefore acquiesce in these petitions and ask the Court to resolve the conflict among the circuits.[10/]

6. Both the House and the Senate have passed bills that will revise the procedures of the Board of Parole. H.R. 5727 was passed by the House on May 21, 1975, and was amended and passed by the Senate on September 16, 1975. As amended, the bill provides in part (121 Cong. Rec. S15952 (daily ed. September 16, 1975)) that:

> Any parolee convicted of any Federal, State, or local crime committed subsequent to his release on parole and sentenced for such crime to a term or terms of imprisonment who has a detainer for a warrant issued under this section placed against him shall receive a revocation hearing within one hundred and eighty days of such placement, or promptly upon release from such commitment, whichever comes first.

10/ If the Court believes it appropriate to grant only one of the petitions and to defer disposition of the other, we suggest that it select No. 75-5215 (Gaddy), in which all of the delay took place after Morrissey, which is not retroactive.

(12)

The House bill contains a significantly different provision with respect to parole revocations; the House and Senate versions disagree on many other particulars. The two bills have been sent to a committee of conference. If a bill with a provision similar to the Senate amendment is reported, passed, and signed by the President, it would provide a statutory solution to the problems that have divided the circuits. 11/

The Office of Legislative Affairs has informed us that because of the considerable differences between the House bill and the Senate amendments the Conference Committee is not expected to resolve them and report quickly. The differences appear to be sufficiently great that a bill is unlikely to be transmitted to the President until some time during 1976; if the Court postpones granting certiorari until Congress has finally acted upon H.R. 5727, it will be unable to resolve the conflict among the circuits during the current Term. Moreover, the Parole Board is opposed to the Senate amendment set out above, and we have been informed that it will urge the Conference Committee to delete or alter it. In light of the differences between the House bill and the Senate amendments, the Conference Committee may well resolve the differences between the bills in a way that does not preempt the constitutional issues that have divided the circuits. Consequently, we believe that the Court should grant certiorari now, so that the Court can consider the issues this Term if H.R. 5727 does not become a law or if any bill finally enacted does not require the Board to alter its present procedures.

CONCLUSION

The petitions for writs of certiorari should be granted. If and when Congress has completed its consideration of H.R. 5727 and

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11/ The Senate version apparently would allow the Board to defer a hearing on parole revocation by declining to lodge a detainer; the 180 day timetable contained in the bill also is longer than the timetable established by the Seventh and Eighth Circuits. However, these circuits may wish to reconsider their decisions in light of the intervening legislation rather than to hold the legislation unconstitutional.

(13)

the President has signed or vetoed the bill, we will submit a supplemental memorandum discussing the applicability of the Act to these cases and whether resolution by this Court still appears to be necessary or desirable.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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SUPREME COURT OF THE UNITED STATES

October Term 1975

MINOR MOODY

V

LOREN DAGGETT

Docket No. 74-6632

PETITIONER'S REPLY TO
RESPONDENT'S MEMORANDUM

Minor Moody, Pro Se
U.S. Penitentiary
Leavenworth, Ks 66048

In a reply brief recommending the Court grant Certiorari to resolve a conflict among the circuits, the Government has assumed Moody relied solely on this Court's ruling in Morrisey v Brewer, 408 US 471 as authority for our argument the Board of Parole must grant a prompt hearing on a parole violation warrant, even when the violation is based on a crime that resulted in a new federal sentence.

Moody's request for a prompt revocation hearing was made in March, 1975 and was based on pre-Morrisey law, 18 USC 4207, which directs:

> "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an Examiner designated by the Board . . ."

The law says nothing about a delay.

Alternatively, because Moody requested the Board to grant a revocation hearing after the Morrisey decision, he is entitled to the benefits of that decision.

Because under pre-Morrisey law Moody was entitled to a prompt revocation hearing, certiorari should be granted.

Respectfully Submitted,

10-24-75
Date

Minor Moody
Minor Moody, Pro Se

Supreme Court, U. S.
FILED
JUL 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY,

Petitioner,

v.

LOREN DAGGETT, *Warden,*
United States Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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A PERSON WHO HAS BEEN CONVICTED OF A NEW CRIME WHILE ON PAROLE HAS LIBERTY INTERESTS AFFECTED BY THE DISPOSITION OF THE PAROLE VIOLATION WARRANT. THIS DISPOSITIONAL DECISION MADE BY THE PAROLE BOARD MAY CAUSE SUBSTANTIAL GRIEVOUS LOSS AND THEREFORE SHOULD BE PRECEDED BY A TIMELY *MORRISSEY* HEARING 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY,

Petitioner,

v.

LOREN DAGGETT, *Warden, United States Penitentiary,*

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTION PRESENTED

Whether a parolee who has been convicted of a new crime committed while on parole is entitled to a timely *Morrissey* hearing prior to a decision by the Parole Board to let the warrant and detainer remain in effect.

REGULATION INVOLVED

40 Fed. Reg. 10583 (March 10, 1975)
Former Title 28 C.F.R.

§2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant

is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

STATEMENT

On February 12, 1962, petitioner was sentenced by a United States District Judge to a term of ten years in prison. After serving four years and three months of that sentence, petitioner was paroled (A.9).

Subsequently, petitioner was convicted of manslaughter and, on February 6, 1976, was sentenced to a term of ten years' imprisonment by the United States District Court for the District of Arizona (A.3). While petitioner was in custody on the intervening sentence, the United States Board of Parole lodged a parole violation detainer against him (A.9).

During 1972 petitioner asked the Board to execute the detainer. By letter dated October 18, 1972, the Board refused to do so, saying:

> The Board has indicated it intends to take you into custody as a federal parole violator at such time as you are released from the sentence for which you are now confined. (A.9).[1]

---

[1]While the record here does not disclose any other information about petitioner or the events which transpired, the omissions are not determinative of the legal issue presented by this case.

On January 22, 1976, apparently with the detainer pending, petitioner filed an application for a writ of habeas corpus, asserting that his parole revocation hearing had not been granted in more than three years and that he was unfairly denied a determination of the charges. He sought dismissal of the warrant (A.10).

The district court dismissed the petition, stating that a revocation hearing was not required until the warrant was executed, and that the Board had no obligation to execute the warrant because petitioner was in custody on the intervening sentence (A.11), citing the Tenth Circuit precedent, *Small v. Britton*, 500 F.2d 299 (1974).

On May 7, 1975, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal on the authority of *Small v. Britton, supra.*

SUMMARY OF ARGUMENT

A parolee who, by the commission of a new crime, violates his parole, has liberty interests in the length of the total period of his custody and in the conditions of his confinement. These interests are contingent upon the Parole Board's decision whether to withdraw, execute, or continue the parole violation warrant lodged as a detainer with the custodial institution. If the Board permits the detainer to stand, the parolee is deprived of the concurrent running of his original term of custody with his new intervening sentence. Moreover, it is likely that he will never receive his earned good time credit and credit for the period of his release on parole prior to the violation. In addition, the presence of the

warrant lodged as a detainer affects his prison classification status and institutional program, as well as his eligibility for specific rehabilitative programs.

The parolee sustains a grievous loss of his liberty interests if the Board permits the warrant to remain in effect rather than choosing a more favorable disposition. Therefore, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), require that the dispositional decision be made only after a timely due process hearing, as prescribed by *Morrissey*. The financial and administrative efforts of providing such hearings are minimal.

Because the Board gave petitioner no hearing prior to its decision to permit the detainer to stand, petitioner is entitled to issuance of the writ of habeas corpus if the delay caused prejudice, or in the alternative, an immediate due process parole revocation hearing.

ARGUMENT

A PERSON WHO HAS BEEN CONVICTED OF A NEW CRIME WHILE ON PAROLE HAS LIBERTY INTERESTS AFFECTED BY THE DISPOSITION OF THE PAROLE VIOLATION WARRANT. THIS DISPOSITIONAL DECISION MADE BY THE PAROLE BOARD MAY CAUSE SUBSTANTIAL GRIEVOUS LOSS AND THEREFORE SHOULD BE PRECEDED BY A TIMELY *MORRISSEY* HEARING.

The Court has held that the liberty of a parolee is protected by due process and may be terminated after a

violation only by "orderly process." *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). The interest in liberty is at stake whatever the nature of the violation which has resulted in the revocation process. Accordingly, where, as here, the violation is a conviction for a new crime rather than a technical violation of parole, a timely hearing under *Morrissey v. Brewer, supra*,[2] is nonetheless required.[3]

The Government asserts, however, that there are no constitutional protections necessary once a violation has been established, for the parolee is then subject to the unfettered discretion of the Parole Board and has no liberty interest at stake (Memorandum for Respondents in response to petition for writ of certiorari, Doc. No.

[2]Since under the newly promulgated rules of the United States Parole Commission, effective May 14, 1976 [28 C.F.R. §2.57; 41 Fed.Reg. 19340 (May 12, 1976)], any order of the United States Board of Parole entered prior to that date is valid [28 C.F.R. §2.57; 41 Fed.Reg. 19340 (May 12, 1976)], this case is not affected by the Parole Commission and Reorganization Act, P.L. 94-233, 94th Cong., 2d Sess.; 90 Stat. 219 *et seq.* (1976). The Parole Board's decision in this case was dated October 18, 1972, and, under the Government's position, if the order is valid petitioner is constitutionally entitled to no hearing.

[3]Indeed, the Seventh, Eighth, and District of Columbia Circuits have concluded that a parolee convicted of a new crime has a sufficient liberty interest to require the protection of a timely *Morrissey* hearing. *Jones v. Johnston*, Doc. No. 74-1424 (D.C. Cir. March 23, 1976); *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975), mandate recalled, No. 74-1057 (August 27, 1975); *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975).

76-6632 at 9-10 and n.7).[4] The Government also argues that if a hearing is required to determine disposition the procedure already provided by the Board is sufficient, and a delayed revocation hearing is adequate.[5]

[4]This threshold posture taken by the Government is more extreme than that of *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974), the precedent upon which both the district court and the court of appeals relied to deny the application for writ of habeas corpus in this case. *Small* held that while a parolee was entitled to the *Morrissey* hearing at the completion of his intervening sentence, the Board was not required to give him that hearing earlier. The court of appeals reasoned that the hearing was not required until the warrant was executed by taking the parolee into Federal custody on the parole warrant. The issue determined by the courts of appeal has been the timeliness of the hearing, not whether it will take place at all. *Jones v. Johnston, supra*, slip op. at 33; *Reese v. United States Board of Parole*, 530 F.2d 231 (9th Cir. 1976), *petition for cert. filed* May 3, 1976, Doc. No. 75-6703; *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 635-636, 638; *Gaddy v. Michael*, 519 F.2d 669, 671 (4th Cir. 1975), *petition for cert. filed* August 5, 1975, Doc. No. 75-5215; *Cleveland v. Ciccone, supra*, 517 F.2d at 1086; *Cooper v. Lockhart*, 489 F.2d 308, 309-310 (8th Cir. 1973); *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974).

[5]Six circuits have held that no hearing need be granted prior to the end of the intervening sentence. *Reese v. United States Board of Parole, supra; Gaddy v. Michael, supra; Orr v. Saxbe*, No. 74-341 (M.D. Pa. November 27, 1974), *aff'd. without opinion*, 517 F.2d 1390 (3d Cir. 1975), *petition for cert. filed sub nom. Reese v. Levy*, October 10, 1975, Doc. No. 75-5594; *Colangelo v. United States Board of Parole*, No. 74-251 (W.D. Ohio December 11, 1974), *aff'd. without opinion*, 517 F.2d 1404 (6th Cir. 1975); *Small v. Britton, supra; Cook v. United States Attorney General, supra.*

A. A parolee who has been convicted of a new crime while on parole has liberty interests in the length of his custody and the conditions of his confinement.

1. The disposition of the warrant determines whether the original sentence will continue to run and whether the parolee shall receive credit for good time and for the period on parole prior to the violation.

Under former 28 C.F.R. §2.53(b) (1975), the rule in effect when petitioner requested execution of his detainer,[6] the Board had available to it three methods of dealing with the parole violation warrant. It could have withdrawn the warrant and detainer, executed the warrant, or, as it did here, permitted the warrant to remain in effect, thereby leaving the detainer undisturbed.

Had the Board lifted the detainer and withdrawn its warrant, petitioner would have been in the status he had at the time of his release on parole. His original sentence would have continued to run, and he would

[6]Former 28. C.F.R. §2.53(b), 40 Fed. Reg. 10983 (March 10, 1975) states:

> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.
>
> (4) Execute the warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

This rule was preceded by one [32 Fed. Reg. 15014 (October 31, 1967)] in which the dispositional possibilities were the same.

not have been deprived of good time credit[7] or credit for the period while on parole (street time). Former 28 C.F.R. §2.53(b)(3) (1975).

If the Board had executed the detainer, the time on the original sentence would have commenced to run from the moment of execution. Former 28 C.F.R. §§2.53(a); 2.53(b)(4) (1975).[8] Although petitioner would have lost street time and good time,[9] the original sentence would have run concurrently with the intervening sentence from the moment of the Board's decision. Former 28 C.F.R. §2.53(b)(4) (1975); *Melson v. Sard*, 402 F.2d 653, 654 (D.C. Cir. 1968); *Smith v.*

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[7]18 U.S.C. §4161 (1970) states, in relevant part:

> Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:
>
> . . . .
>
> Ten days for each month, if the sentence is ten years or more.

[8]Issuance of the parole violation warrant stops the sentence from running from the date of the violation, and execution of the warrant starts the time running again. Former 18 U.S.C. §4205 (1970), *repealed*, P.L. 94-233, 94th Cong., 2d Sess., §2; 90 Stat. 219; former 28 C.F.R. §2.51 (1975); *Zerbst v. Kidwell*, 304 U.S. 359 (1938).

[9]Former 18 U.S.C. §4205 (1970); former 28 C.F.R. §2.51 (1975); *Peacock v. Hughes*, 427 F.2d 359 (5th Cir. 1970); *Canavari v. Richardson*, 419 F.2d 1287 (9th Cir. 1969); *McKinney v. Taylor*, 358 F.2d 689 (10th Cir. 1966).

Rivers, 388 F.2d 567, 575 (D.C. Cir. 1967); *Mock v. United States Board of Parole*, 345 F.2d 737 (D.C. Cir. 1965).

The third disposition under the Board's rules, the one made here, was to permit the detainer to stand. Former 28 C.F.R. §2.53(b)(1) (1975). This disposition continued the cessation of the original sentence, and required the parolee to serve his original sentence consecutively to the intervening period of incarceration. It extended the parolee's maximum expiration date, since the parolee receives no credit on his original sentence while serving the intervening sentence. There is also the substantial likelihood that at the end of the intervening sentence he will lose credit for his parole release time and his earned good time. See *Jones v. Johnston*, Doc. No. 74-1424, slip op. n.16 at 16-17, 25 (D.C. Cir. March 23, 1976); *Cleveland v. Ciccone*, 517 F.2d 1082, 1086 (8th Cir. 1975).

Thus, the Board's determination to allow the detainer to stand carried with it a serious deprivation of petitioner's freedom, as had the administrative decisions rendered in *Morrissey* and *Scarpelli*. By its decision, the Board insured that the original term could not run concurrently with the new sentence, and that petitioner would probably lose credit for the good time he may have earned by satisfactory prison behavior as well as credit for the period he was on parole prior to the conduct which constituted the violation. As a result of the decision, petitioner faces an additional period of custody of up to five years and three months after completion of his present period of incarceration. Consequently, petitioner has a substantial interest in the timely disposition of the warrant.

2. The pendency of the detainer affects conditions of confinement.[10]

The detainer has an effect on the assignment of classification and prison programming, both of which are, by Bureau of Prisons regulations, protected interests. The purpose of custody classification is "to assure the orderly operation and security of the institution, community protection, to provide a means for assigning quarters, details and community activities" [Bureau of Prisons Policy Statement No. 7300.112 (April 8, 1976)], and for development of an individual program plan and treatment. Bureau of Prisons Policy Statement No. 7200.11A (March 6, 1972). The standards for assigning classification set out by the Bureau are, *inter alia*, degree of escape risk, history of violent behavior, length of sentence, type of offense, prior record, threats against Government officials, institutional adjustment, and the demonstrated ability to function with limited or no supervision. Bureau of Prisons Policy Statement No. 7300.112 ¶5 (April 8, 1976).

Not only is the classification assignment and program for each inmate made in accord with the standards established by the Bureau of Prisons, but the Bureau's regulations also prohibit increase in restrictive custody when the inmate is transferred from one institution to another unless there are circumstances which warrant an increase and the reasons for the increase are documented.

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[10]This claim does not go to the validity of the initial lodging of a detainer when a judgment is rendered. The act of lodging a detainer is comparable to detaining a parolee after the preliminary hearing deemed necessary by *Morrissey*.

Bureau of Prisons Policy Statement No. 7300.112 ¶7 (April 8, 1976). Further, even if the transfer, with its potential loss of classification status, is for disciplinary reasons, the transfer may be made only after notice is given and a hearing is held at which the inmate may call witnesses and present evidence. Bureau of Prisons Policy Statement No. 7400.5D ¶9(c); 9(d)(6) (July 7, 1975). Thus, the Bureau's regulations have created a liberty interest in classification and programming determined and modified by specific standards in accord with specific procedures. *Wolff v. McDonnell*, 418 U.S. 539 (1974); see *Meachum v. Fano*, 44 U.S.L.W. 5053, 5057 (Sup. Ct. June 25, 1976); *Montanye v. Haymes*, 44 U.S.L.W. 5051 (Sup. Ct. June 25, 1976).

A detainer is one factor considered in the initial classification. Bureau of Prisons Policy Statement No. 7200.11A §§5(D)(2)(b) at 4; 6(A) at 5 (March 6, 1974.[11] The detainer is treated as an element separate from the circumstances of the new crime [see *id.* at §5(D)(1)(a), (b)] and has an independent effect on classification. An inmate is adversely affected by a detainer because he is considered a higher escape risk [see Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 419; Bennett, *The Last Full Ounce*, 23 Fed.

[11]On the effects of detainers, see generally *Jones v. Johnston*, *supra*, slip op. at 11-12, 22-23; *United States ex rel. Hahn v. Revis*, *supra*, 520 F.2d at 637; *Cooper v. Lockhart*, *supra*, 489 F.2d at 313-315; S.Rep. No. 91-1356, 91st Cong., 2d Sess. (November 23, 1970), reproduced at 1970 U.S. Code Cong. & Admin. News 4864, 4866; Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175, 228-230 (1970); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 418-422.

Prob. No. 2 at 20-21 (1959); *Lawrence v. Blackwell*, 298 F. Supp. 708, 714 (N.D. Ga. 1969)], and because the presence of the detainer indicates the likelihood of an additional period of incarceration. Both are factors considered in classification.[12]

[12]The Government asserts that it is not the detainer which produces these results, but decisions of the custodian. However, the custodian's actions are in response to the detainer (*Cooper v. Lockhart*, *supra*, 489 F.2d at 313) and he acts as agent for the jurisdiction issuing the detainer. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 498-499 (1973). *Cf. State Board of Regents v. Roth*, 408 U.S. 562, 573-574 (1972).

In *Gaddy v. Michael*, *supra*; *Cook v. United States Attorney General*, *supra*; and *Orr v. Saxbe*, *supra*, the courts concluded that it was not the detainer but the underlying facts of the new crime and the fact of the parole violation which affected classification. However, both the underlying facts and the pendency of the detainer have effects on classification. Further, the purpose of a parole revocation hearing is to reveal information about the new crime as well as other mitigating facts.

The United States Bureau of Prisons itself has recognized the deprivations caused by a detainer:

> [U]ncertainty as to status can have an adverse effect on our efforts to provide offenders with correctional services; we should encourage detaining authorities to dispose of pending untried charges against offenders in Federal custody.
>
> The casework staff at all institutions may cooperate with and give assistance to offenders in their efforts to have detainers against them disposed of either by having the charges dropped, by restoration of probation or parole status, or by arrangement for concurrent service of the state sentence.
>
> . . . .
>
> The presence of a detainer oftentimes has a restricting effect on efforts to involve the offender in correctional

(continued)

Furthermore, whenever a detainer is lodged, its seriousness, which is determined in part by the ultimate sentence to be served on the violation, is considered in classification and programming. Bureau of Prisons Policy Statement No. 7300.112 ¶4 (April 8, 1976); Bureau of Prisons Policy Statement No. 7500.72 ¶4 (May 8, 1972). The sentence which must be served by the parolee for the parole violation is, of course, determined by the Parole Board.

The detainer must also be considered in classification reductions. Bureau of Prisons Policy Statement No. 7300.112 ¶4 (April 8, 1976). It is highly relevant to appraising the inmate's ability to function with limited supervision, a factor which must be considered in giving minimum or community custody. Minimum custody renders the inmate eligible for the least secure housing facilities, honor camps, and farms, and work outside the institution with reduced supervision. Bureau of Prisons Policy Statement No. 7300.112 ¶5(d) (April 8, 1976). This type of custody is required for work/study release [Bureau of Prisons Policy Statement No. 7500.20B ¶4(c)(2) (November 16, 1971)] which enables the inmate to earn meritorious good time (*id.*, ¶4(e) at 5).

The lowest level of custody – community custody -- is necessary for release on furloughs. Bureau of Prisons Policy Statement No. 7300.12D ¶5(c)(1)(b) (March 19, 1976).

(footnote continued from preceding page)

programs. For this reason, caseworkers at Federal institutions are expected to assist offenders in their efforts to have detain[ers] disposed of.

Bureau of Prisons Policy Statement No. 7500.14A at 1 (January 7, 1970).

Since both minimum and community custody allow a low degree of supervision, the detainer is virtually certain to preclude such classification assignments.

These tangible results of the detainer in turn affect the parolee's own incentive for rehabilitation and participation in prison programs, since at some stage the detainer will preclude further advancement. See *Smith v. Hoey*, 393 U.S. 374, 378-379 (1969).[13]

B. The liberty interests in the length of custody and conditions of confinement are protected by due process.

Liberty includes freedom from bodily restraint. *State Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Thus, confinement resulting from the refusal to allow the sentences to run concurrently may not be imposed without due process (*Morrissey v. Brewer, supra*) even if that period of restraint does not begin until a future date. *Peyton v. Rowe*, 391 U.S. 54 (1968). Good time credit, having been granted by statute and earned by the parolee, may not be denied without an opportunity to be heard. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Preiser v. Rodriquez*, 411 U.S. 475, 487-488 (1973). An inmate's current classification and his institutional program,

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[13]To avoid the adverse results, state parole detainers and those based on criminal charges may be challenged in Federal courts. *Braden v. 30th Judicial Circuit Court of Kentucky, supra*, 410 U.S. 484; *George v. Nelson*, 399 U.S. 224 (1970); *Cooper v. Lockhart, supra*. Some Federal courts have directed that Federal prisons give no effect to unprocessed state detainers lodged against inmates of Federal institutions. *Wingo v. Ciccone*, 507 F.2d 354 (8th Cir. 1974); *Mattingly v. Ciccone*, 503 F.2d 502 (8th Cir. 1974); *McEachern v. Henderson*, 485 F.2d 694 (5th Cir. 1973); see also *Shelton v. Meier*, 485 F.2d 1117 (9th Cir. 1973). Similarly, unprocessed Federal detainers should not be permitted to have their adverse effects.

having been established in accord with Bureau of Prisons standards and protected by Bureau of Prisons procedures, may not be made substantially more restrictive without procedural due process. *Wolff v. McDonnell, supra,* 418 U.S. at 547, 571; *Haines v. Kerner,* 404 U.S. 519 (1972).[14] Nor may he be deprived of a more favorable prison classification and the right to participate in programs for which he is otherwise eligible without due process. *Cardaropoli v. Norton,* 523 F.2d 990, 994-995 (2d Cir. 1975); see *Hampton v. Mow Sun Wong,* 44 U.S.L.W. 4737, 4741 (Sup. Ct., June 1, 1976); *Board of Regents v. Roth, supra,* 408 U.S. at 572; *Willner v. Committee on Character,* 373 U.S. 96, 102-103 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958); *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926).

C. The liberty interest exists even if a parole violation is established.

Under the Board's rules and procedures, the finding of a violation does not preclude withdrawal or execution of the warrant and detainer. The Board goes beyond that to determine whether these favorable dispositions are appropriate [former 28 C.F.R. §2.56(b) (1975)]. Thus, under the rules, even if the violation is a new conviction, the parolee has the right to "communi-

[14]In *Baxter v. Palmigiano,* 96 Sup.Ct. 1551, 1560 (April 20, 1976), the Court declined to rule on what due process was required in prison disciplinary proceedings where the records did not reveal the liberty which was lost by the inmate. However, here the effect of the detainer can be demonstrated by examining the Bureau of Prisons policies.

cate with the Board relative to disposition of the warrant," and to dispositions of withdrawal or execution of the warrant. Former 28 C.F.R. §2.53(a) (1975)]. This communication is assumed to entitle the parolee to present mitigating evidence with respect to the new crime or relevant to the parolee's reputation and conduct in the community. *Jones v. Johnston, supra,* slip op. at 17-18.

There can be no doubt that in Federal parole proceedings the dispositional decision has traditionally been determinative of liberty interests. See *United States ex rel. Obler v. Kenton,* 262 F.Supp. 205, 208-9 (D. Conn. 1967); *United States ex rel. Vance v. Kenton,* 252 F.Supp. 344, 346 (D. Conn. 1966); Note, *Parole Revocation in the Federal System,* 56 Geo. L. J. 705, 717-718 n.101, 731 (1968).[15] Indeed, according to Parole Board Chairman Maurice Sigler, even under the challenged procedures, from a group of 30 parolees convicted of new crimes and given dispositional reviews, one-third received withdrawal or execution of the warrant. Affidavit of Chairman Sigler quoted in *Jones v. Johnston, supra,* slip op. at 16-17 n.6; see also *Smith v.*

[15]In *Smith v. Rivers,* 388 F.2d 567, 575 (D.C. Cir. 1967), the issue of what procedures were necessary for disposition of pending Federal parole violation warrants was avoided because the Board issued a new set of rules [32 Fed.Reg. 15014 (1967)], which ostensibly established a fair procedure for disposing of detainers. The court of appeals said:

> [W]e are not prepared to hold that failure to afford a procedure whereby the violator may seek a favorable disposition, or an outright refusal to consider proffered evidence in mitigation, is immune from judicial overview. 388 F.2d at 576.

Rivers, supra, 388 F.2d at 576 n.18.

Reflecting the importance of the dispositional decision to the parolee's liberty interests, both *Morrissey v. Brewer, supra,* 408 U.S. at 478-480, 483-484, 488, and *Gagnon v. Scarpelli, supra,* 411 U.S. at 787, 790, hold that this discretionary aspect of the revocation decision may be exercised only after a prescribed due process hearing. The hearing will enable the Board to have an accurate knowledge of the parolee's behavior (*Morrissey v. Brewer, supra,* 408 U.S. at 484), and to consider whether the facts as determined warrant revocation. The parolee "must have an opportunity to be heard and to show . . . that circumstances in mitigation suggest that the violation" should not result in unfavorable dispositions (*Morrissey v. Brewer, supra,* 408 U.S. at 488), and this opportunity must be given although "in most cases" the parolee has been convicted of another crime or has admitted the charges (*Gagnon v. Scarpelli, supra,* 411 U.S. at 787).[16] Indeed, because the dispositional aspect of the hearing is important to the parolee's liberty, *Gagnon* provides counsel even where the alleged violation is admitted or is a matter of public record if the reasons making revocation inappropriate are such

[16]In light of *Gagnon,* the Government is in error when it relies on one sentence in *Morrissey* for the position that no hearing is required when the violation is established. Moreover, that language in *Morrissey,* 408 U.S. at 490, is that a violation may be reasonable grounds for revoking parole under *state standards.* However, under Federal standards the fact of a conviction alone does not produce reasonable grounds for an unfavorable disposition until the whole of the parolee's record is reviewed. See post at 20, n.18.

that the parolee needs assistance in their presentation (411 U.S. at 790).[17]

The broad discretion permitted the Board in making its disposition only emphasizes that the discretion must be exercised after a fair proceeding. *Goss v. Lopez,* 95

[17]In *Gaddy v. Michael, supra; Small v. Britton, supra; Cook v. United States Attorney General, supra; Reese v. United States Board of Parole, supra;* and *Orr v. Saxbe, supra,* the courts of appeal concluded that the petitioners' failure to show evidence in mitigation either at the belated parole revocation hearing or at the proceeding on the writ of habeas corpus indicated that they were not prejudiced by the Board's procedures. However, the likelihood of success in each case is not relevant to the question of what procedures should be generally used. If due process protects the liberty interest, each individual must be afforded an opportunity to make his own case. *Fuentes v. Shevin,* 407 U.S. 67, 87 (1972); *Stanley v. Illinois,* 405 U.S. 645, 654-655 (1972); *Bell v. Burson,* 402 U.S. 535, 541 (1971); *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915). Moreover, case by case determination of whether an unreasonable delay in the parole hearing resulted in prejudice requiring release is likely to increase the number of requests for judicial determination of the issue by petitions for writs of habeas corpus. See *Jones v. Johnston, supra,* slip op. at 35. A timely parole hearing would avoid such a result.

In addition, here no parole hearing has ever been granted to petitioner, and the Board's position is that none need be given. There is no indication in the record that petitioner was advised that he could submit evidence on his own behalf or that he would have been able to do so without assistance. Compare *United States ex rel. Hahn v. Revis, supra,* 520 F.2d at 638, where complicated mitigating facts were presented by counsel. The denial of the *pro se* petition for writ of habeas corpus was premised entirely on the holding that no parole hearing need be given prior to the expiration of the intervening sentence.

Sup. Ct., 729, 737 (1975); *Board of Regents v. Roth, supra,* 408 U.S. at 576 n.15; *Morrissey v. Brewer, supra,* 408 U.S. at 483; *Willner v. Committee on Character, supra,* 373 U.S. at 103; *Goldsmith v. Board of Tax Appeals, supra,* 270 U.S. at 123. Nor, indeed, is the discretion so expansive as the Government's argument would have it. At least since December 1971, the Board has stated that its policy is that "information to sustain revocation shall consist of the fact of violation, plus consideration of whether or not the parolee is a good parole risk."[18] See *Preston v. Priggman,* 496 F.2d 270, 274 (6th Cir. 1974); *Caton v. Smith,* 486 F.2d 733, 735 (7th Cir. 1973); Note, *Parole Revocation in the Federal System, supra,* 56 Geo. L.J. at 717-718 n.101, 724.

The purpose of the due process proceeding required here is to minimize unjust revocation so that the parolee will not be detained longer than necessary. The hearing will also help to prevent the in-prison consequences of a detainer left pending without justification. The mere pendency of a parole violation detainer is likely to be used in the prison classification procedure not only as a measure of increased escape risk, but also as an adverse index of the parolee's ability to function under reduced supervision. However, a decision by the Parole Board to withdraw or execute the warrant and detainer is a finding that the parolee is a "good risk" and can comply with

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[18]United States Board of Parole Policy Paper on Parole Revocation at 13 (December 1971), attached to Bureau of Prisons Policy Statement No. 40100.18 (February 2, 1972).

conditions of reduced supervision. A favorable Parole Board decision is thus likely to result in a more advantageous prison classification assignment.

The hearing will enable the Board to exercise its discretion more accurately, for the decision will be premised on knowledge of the facts. *Morrissey v. Brewer, supra,* 408 U.S. at 484. See *Goss v. Lopez, supra,* 95 Sup. Ct. at 739; *Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972); *Jones v. Johnston, supra,* slip op. at 18-19, 43-44. The hearing does not, however, interfere with the Board's discretionary power to render what it considers to be an appropriate decision. *Morrissey v. Brewer, supra,* 408 U.S. at 483.[19]

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[19]This distinction was overlooked in *Gaddy v. Michael, supra,* 430 F.2d at 678, where the court held there was no right to an opportunity to present evidence in favor of a specific disposition. Petitioner's analysis does not affect the principle of *Zerbst v. Kidwell, supra,* 304 U.S. 359; see, *e.g., Nash v. Moseley,* 433 F.2d 923 (10th Cir. 1970); *Adams v. United States,* 432 F.2d 62 (5th Cir. 1970); *Moore v. Smith,* 412 F.2d 720 (7th Cir. 1969), that service of an intervening Federal sentence does not automatically continue the running of the original term of imprisonment.

Further, the constitutional question is not answered by the position in *Small v. Britton, supra,* and *Cook v. United States Attorney General, supra,* that under the language of former 18 U.S.C. §4207 (1970) a hearing constitutes execution of the warrant and that therefore a hearing could be denied to prevent automatic sentence concurrency. If petitioner is constitutionally entitled to a hearing, the statute must be reinterpreted. See *Jones v. Johnston, supra,* slip op. n.40 at 33; *Cleveland v. Ciccone, supra,* 517 F.2d at 1087.

D. A *Morrissey* hearing is required.

Since the disposition portion of the revocation hearing may seriously abrogate a parolee's liberty interests, it should be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Morrissey* dictates both the procedure (408 U.S. at 489) and the timing (408 U.S. at 488) of the hearing. Contrary to *Morrissey*, in this case there was no hearing. The record shows that petitioner wrote to the Board requesting execution of the warrant and, in response, received only a letter saying that he would be taken into custody at the end of his intervening sentence.[20] If under Board procedure a hearing were granted at that time [former 28 C.F.R. §2.55 (1975)], eight years after petitioner's request,[21] the hearing

[20]Under former 28 C.F.R. §2.53(a) and its predecessor, the Board should have conducted a dispositional review of a parolee's case when he requested a decision. There is no indication that such a record review (see *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 638) was made here. Moreover, a record review does not comply with due process standards of *Morrissey*.

Under the rules, the Board also had the power to grant a discretionary dispositional interview. However, it did not do so here. What is more, a discretionary hearing does not comply with due process. *Coe v. Armour Fertilizer Works, supra*, 237 U.S. at 424; *Cleveland v. Ciccone, supra*, 517 F.2d at 1088-1089.

[21]The record shows that petitioner's request was made some time during 1972; the decision was rendered on October 18, 1972. Since *Morrissey* requirements are not retroactive (*Morrissey v. Brewer, supra*, 408 U.S. at 490), petitioner's right to a hearing must be deemed to have accrued at least within a reasonable time after *Morrissey*.

would be too late to protect petitioner's liberty. It would not cure the harm caused by the denial of participation in prison rehabilitative programs or the deprivations of an improper prison classification. These are irremediable after the intervening sentence has been served.

Moreover, when the intervening sentence ends the Board loses the intermediate option of revoking parole but permitting some time of the two terms to run concurrently, for the language of neither former 28 C.F.R. §2.53 (1975) nor former 28 C.F.R. §2.55(c) (1975) authorized the Board to grant partially retroactive concurrent sentences. Therefore, a hearing held at the end of the intervening sentence cannot cure the substantial losses produced by delay.

Postponement of the hearing is also destructive of the petitioner's ability to show that he merits withdrawal of the warrant altogether so that good time and street time credit are not forfeited. Mitigation evidence the parolee might have gathered earlier becomes stale and unpersuasive.[22] The ineffectiveness of such evidence is highlighted by changes in personal relationships which necessarily result from the parolee's incarceration. Helpful evidence not previously obtained may be forever lost by the delay. Witnesses may become unavailable or uninterested many years later.

Furthermore, a delay in the hearing will render ineffective the *Morrissey* requirement of disclosure to

[22]The record does not reveal whether petitioner was notified about or had any knowledge of his right to present written evidence in mitigation to the Board. If he was not notified of his opportunity to present such evidence, the Board's actions deprived him even of the minimal procedures granted.

the parolee of the evidence against him,[23] for after the lapse of time he may be unable to respond to errors, inaccuracies, or incompleteness in the Board's records. *Mathews v. Eldridge*, 96 Sup. Ct. 896, 908 (February 24, 1976). These problems, caused by the delay, leave petitioner's liberty interests unprotected.[24]

Under *Morrissey*, the hearing must not only be timely, but the parolee must be present. Presence is significant for the parolee may not be aware of matters in which the examiner has an interest or about which he wishes to make inquiry. Compare *Mathews v. Eldridge, supra*, 96 Sup.Ct. at 907-908. Thus, a face-to-face

[23]The Board's usual procedure is to make a record review of all documents at its disposal [Parole Form H-6, H-3(a)]; affidavit of United States Board of Parole Chairman Maurice Sigler quoted in *Jones v. Johnston, supra*, slip op at 4, n.4; *Gagnon v. Scarpelli, supra*, 411 U.S. at 784, n.8; Johnson, *Federal Parole Procedures*, 25 Admin. L. Rev. 459, 487-489, 509-513 (1972).

[24]The Board has asserted that a delay in the hearing is necessary so that information about the parolee's prison conduct can be obtained and perhaps influence a favorable disposition. See *Reese v. United States Board of Parole, supra; Orr v. Saxbe, supra*. However, the Board's ability to consider the prison behavior and record of the parolee was not impaired by provision of a timely hearing. Under former 28 C.F.R. §2.53(c) (1975), the Board had the institution record made available to it on an annual basis and, even if an unfavorable decision was initially made, the Board could reopen the case for further consideration based on the prison record. Former 28 C.F.R. §2.28 (1975); *Jones v. Johnston*, slip op. at 19, 25; see also *Wolff v. McDonnell, supra*, 418 U.S. at 560-561. If the parolee desires to have the Board postpone the hearing in order to consider his prison record, he should be permitted this choice by his waiver of a timely due process proceeding. However, his right to a hearing should not be denied him on this premise.

meeting is necessary so that the parolee can focus his responses to the inquiries of the examiner. Moreover, the evidence presented by the parolee relating to his conduct, activities, and reputation, will inevitably raise questions of credibility and demeanor. If the parolee cannot produce specific factual information, either through his own testimony or otherwise, to support his position, his credibility is weakened. *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 639.

The *Morrissey* hearing held early during the intervening sentence should not cause financial or administrative burdens which outweigh the due process requirements. *Gagnon v. Scarpelli, supra*, 411 U.S. at 782 n.5. Indeed, where, as here, the parolee is in a Federal institution, there is minimal added burden. The Board or its examiners regularly sit at each institution, and cases such as petitioner's can be added to the docket and heard by the examiners present.

Moreover, the division of the Board into a minimum of five regions (18 U.S.C. §4203(a)(2), 90 Stat. 220) and the power to delegate authority to conduct hearings to local Federal executive and judicial officers (18 U.S.C. §4203(c)(3), 90 Stat. 220) offers the Board sufficient flexibility to arrange such procedures as are necessary.

E. Petitioner is entitled to dismissal of the warrant if he has been prejudiced by the delay, or alternatively to a prompt parole hearing.

Petitioner was entitled to a parole revocation hearing

within a reasonable period after *Morrissey* or after his request for disposition, whichever came later. Since no parole revocation hearing has been granted, petitioner is entitled to a hearing in the district court to determine whether he was prejudiced by the denial of the parole hearing. If he establishes prejudice, the writ of habeas corpus should issue. Alternatively, he should be given a prompt revocation hearing. Furthermore, to the extent that the time which remains to be served on petitioner's intervening sentence is less than the time owed on his original sentence, petitioner has been irretrievably denied the opportunity to serve the two sentences concurrently. Therefore, the Board should be directed to give him credit for that portion of his term regardless of the Board's decision since he was denied a fair opportunity to obtain his concurrency at the earlier date.

CONCLUSION

For the above-stated reasons, the order and judgment of the court below should be reversed.

Respectfully submitted,

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No. 74-6632

In the Supreme Court of the United States

OCTOBER TERM, 1976

MINOR MOODY, PETITIONER

v.

LOREN DAGGETT, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (A. 15-16) is not reported. The memorandum of the district court (A. 11-12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1975. The petition for a writ of certiorari

was filed on June 2, 1975, and was granted on March 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Parole Commission's procedures for considering the status of parolees who are convicted of crimes committed while on parole comport with the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution provides in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Pertinent provisions of statutes and regulations appear in Appendix A, *infra*, pp. 1a-19a.

STATEMENT

1. Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of rape within Indian country, in violation of 18 U.S.C. 1153. On February 12, 1962, he was sentenced to 10 years' imprisonment. Petitioner did not appeal. He was paroled on April 11, 1966, with nearly six years (2,132 days) remaining to be served on his sentence.

In the early morning hours of February 14, 1971, petitioner shot and killed his wife and another woman on the Fort Apache Indian Reservation. On December 6, 1971, he was convicted in the United States District Court for the District of Arizona, upon his plea of guilty, of the offenses of manslaughter and second degree murder within Indian country, in violation of 18 U.S.C. 1153. He was sentenced to concurrent terms of 10 years' imprisonment for these offenses, with eligibility for parole pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2).

Petitioner was imprisoned in the United States Penitentiary at Leavenworth, Kansas. The United States Board of Parole then issued a parole violator warrant, which was lodged as a detainer against petitioner. By letter of July 16, 1972, petitioner requested the Board to execute the parole violator warrant; he contended that any additional imprisonment for violation of the terms of his parole should run concurrently with the 1971 sentence.[1] On October 18, 1972, the Board responded that it did not desire to take petitioner into its custody until he had completed serving the 1971 sentence (A. 9). Following the yearly review of petitioner's case provided by the regulations then in effect (28 C.F.R. 2.53(a); App. A, *infra*, p. 9a), the Board decided on April 1, 1974, that the detainer should stand unexecuted, and it so ad-

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[1] This letter is in petitioner's parole file but is not part of the record of this case. A copy of this handwritten letter is reproduced in Appendix B, *infra*, p. 20a.

vised petitioner. It scheduled another review for April 1975.[2]

On January 22, 1975, petitioner filed a petition for a writ of habeas corpus. He contended that the court should dismiss the parole violator warrant because, although more than three years had elapsed after his 1971 conviction, the Board had not held an oral, adversarial hearing on the disposition of the warrant (A. 2-10).[3] On January 27, 1975, before the Board had filed a responsive pleading, the district court dismissed the petition (A. 11-12). The court stated that "[t]he parole board is under no obligation to execute the warrant inasmuch as petitioner has been in custody on his 1971 manslaughter sentence since

[2] This information, too, is not in the record. It is not inconsistent with petitioner's pleadings in any manner, however. Copies of the progress report and recommendation that led to this decision, as well as the decision itself, are reproduced in Appendix C, *infra*, pp. 21a-28a.

[3] Although petitioner has not been afforded an oral hearing concerning the disposition of the warrant and detainer, we have been informed by the Parole Commission that on March 7, 1972, an oral and adversarial hearing was held concerning possible parole from the 1971 sentence. Petitioner's case was continued, and an institutional review was set for March 1975. A regular oral review hearing was held on January 14, 1975. On March 3, 1975, the North Central Region of the Board of Parole notified petitioner that he would be held in custody on the 1971 sentence until its expiration. If petitioner accumulates and retains the maximum "good time" for which he is eligible (see 18 U.S.C. 4161) he will be released from the 1971 sentence on September 11, 1977. The Parole Commission then will execute the warrant, retake petitioner as a parole violator on the 1962 sentence, and hold a full oral hearing concerning the potential revocation of parole. See 18 U.S.C. 4214(c), App. A, *infra*, p. 6a.

the time the warrant was issued and filed as a detainer against him" (*ibid.*).

The court of appeals affirmed (A. 15-16), following its earlier opinion in *Small* v. *Britton*, 500 F.2d 299 (C.A. 10), which had held that a prisoner is not deprived of "liberty" by the Board until the warrant is executed, and that the Due Process Clause therefore does not require a pre-execution hearing.

2. This case was dismised on the pleadings, and petitioner's factual allegations therefore must be accepted as true. But these allegations do not tell the whole story, for this case involves the constitutionality of an Act of Congress and many implementing regulations and practices. The statute and regulations, which are at the heart of this case, deserve amplification.

At the time of the events described above, the Board of Parole's decisions to revoke or not revoke parole were governed by 18 U.S.C. 4205 and 4207 (see App. A, *infra*, p. 1a). These statutes gave the Board discretion to formulate appropriate procedures for making revocation decisions. The Board adopted a program under which a parole violator warrant would be issued whenever a federal parolee was convicted by any court of an offense committed while on parole (28 C.F.R. 2.53, App. A, *infra*, pp. 9a-10a). This warrant, which could be issued only within the original term of parole, was lodged as a detainer with the institution in which the parolee was incarcerated on his intervening sentence.

The Board's practice was to notify the parolee that the warrant had been issued and lodged as a detainer, and to invite the parolee to respond. Upon receiving a response, the Board would review the parolee's case and make a tentative decision whether (1) to revoke parole immediately, so that the service of the intervening sentence would run concurrently with the service of the original sentence for which parole had been revoked; (2) to dismiss the warrant altogether, thus effectively deciding not to revoke parole; or (3) to defer making a final decision until the intervening sentence had been served. We have been informed that the Board almost always deferred making a decision, for the Board believed that the parolee's institutional record while serving the intervening sentence was an important factor to be considered in making the revocation decision.

On a few occasions, however, the parolee presented the Board with information that, if true, would have led the Board to revoke parole immediately or to dismiss the warrant. Whenever such information was presented, the Board set the case for a prompt oral hearing at the place of confinement. Hearings of this sort were used to receive any mitigating evidence the parolee had to offer, if, in the Board's opinion, that evidence might affect its decision. If no oral hearing was held, however, the Board conducted an annual review of the parolee's file to determine whether the warrant should be executed or dismissed, or disposition deferred. The Board's practice was to notify the parolee of this impending review and to invite

him to submit additional information pertinent to its decision. When the parolee was, as here, confined in a federal prison, the staff of that prison conducted a full review of his status, including an interview with the parolee, and forwarded a progress report to the Board. That was done in petitioner's case. See App. C, *infra*, pp. 25a-28a.

Once the intervening term of imprisonment had been served, or parole had been granted on that sentence, the Board executed the warrant and retook the individual as a parole violator. It then promptly held a full adversarial hearing and decided to revoke parole, to reparole the individual, or to terminate its supervision.

3. Shortly after the Court granted the petition in this case Congress enacted the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.* This Act, which renamed the Board of Parole as the Parole Commission and made numerous changes in the substantive rules for granting parole, became effective on May 14, 1976. The Parole Commission has promulgated new regulations to carry out its duties under the Act. See 41 Fed. Reg. 19326 *et seq.*

The Act articulates in some detail the procedures the Commission must use to revoke parole. To a substantial extent these procedures (App. A, *infra*, pp. 1a-9a) track those the Board of Parole had been using.[4]

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[4] The most important differences concern the procedures for revocation of the parole of one who has committed only

Congress provided that a criminal conviction for a crime committed while on parole is *prima facie* proof of violation of the terms of parole, and therefore that the Parole Commission need not afford these parolees a prliminary revocation hearing. 18 U.S.C. 4214(b)(1), App. A, *infra*, p. 5a. If the parolee is incarcerated for the new crime, a parole violator warrant must be issued promptly (18 U.S.C. 4213(b), App. A, *infra*, p. 2a) and may be placed against him as a detainer.[5] The Commission must review the detainer within 180 days (18 U.S.C. 4214(b)(1), App. A, *infra*, p. 5a). The parolee must be notified of the impending review and be given an opportunity to submit a written application containing information he considers relevant to the Commission's decision (*ibid.*). If the parolee desires, legal counsel will be appointed to assist him in preparing the application (18 U.S.C. 4214(b)(1), incorporating 18 U.S.C. 4214(a)(2)(B), App. A, *infra*, pp. 6a, 3a). If, after hearing from the parolee, the Commission determines

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an administrative, rather than a criminal, violation of the terms of his parole. 18 U.S.C. 4214(a), App. A, *infra*, pp. 3a-5a. See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 34 (1976). See also 90 Stat. 226-227, amending 18 U.S.C. 4210, which provides that a parolee who commits an administrative violation of the conditions of his parole shall be credited with the time spent on parole (commonly known as "street time"), although a parolee convicted of a crime while on parole receives no credit. S. Conf. Rep. No. 94-648, *supra*, at 32.

[5] If the parolee is not incarcerated for the intervening offense, he receives an oral parole revocation hearing within 90 days of being taken into federal custody. 18 U.S.C. 4214(c), App. A, *infra*, p. 6a.

that additional information is needed to make a decision, it may conduct a "dispositional hearing" at the institution where the parolee is confined (18 U.S.C. 4214(b)(2), App. A, *infra*, p. 6a).[6] After the dispositional review or oral hearing, the Commission may execute the warrant, withdraw it, or let it stand without making a final decision. Once this initial decision has been made, there is no further review until the intervening sentence has expired. It is the policy of the Commission that "in the absence of substantial mitigating circumstances" the parole violator term of a parolee convicted of a new criminal offense will run consecutively to any sentence imposed for the intervening conviction. 28 C.F.R. 2.47(c), App. A, *infra*, p. 13a.

If the Commission decides to let the detainer stand without making a final decision, the parolee must be given an oral revocation hearing within 90 days after he is taken into the Commission's custody after release from the intervening term. 18 U.S.C. 2414(c), App. A, *infra*, p. 6a.

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[6] If the Commission decides to conduct such a hearing, the parolee is entitled to have notice of the hearing, to appear and testify in his own behalf, and to have the assistance of counsel.

The Parole Commission's regulations also provide that the Regional Commissioner may order a "revocation hearing" conducted at the institution where the parolee is confined. Following this hearing the Commission may, if parole is to be revoked, order either concurrent or consecutive service of the parole violator term. 28 C.F.R. 2.47(b)(3), App. A, *infra*, p. 12a.

SUMMARY OF ARGUMENT

I

A. Petitioner's claim to procedures more elaborate than those he has so far received rests upon the Due Process Clause of the Fifth Amendment. But that Clause applies only in those circumstances where governmental action threatens to deprive a person of "liberty" or "property." Thus an evaluation of petitioner's claim must begin with an inquiry into whether the possibility that petitioner's parole might be revoked in the future is a present deprivation and, if it is, whether that deprivation involves a liberty or property interest.

B. We submit that no significant deprivation occurs until a parolee is retaken as a parole violator. The issuance of a parole violator warrant, and its lodging as a detainer at the place of a parolee's confinement for an intervening crime, are no more than a statement by the Parole Commission that there may be sufficient cause to revoke parole in the future. The warrant and detainer themselves create neither a deprivation nor the possibility for one.

The imprisonment petitioner now is serving is attributable to his conviction for the intervening crime; it is not caused by the detainer. The possibility that petitioner's parole may be revoked in the future is caused by the intervening conviction rather than the detainer. Any disadvantages petitioner may suffer during the intervening sentence are caused by the fact that he is a multiple offender; the warrant and

detainer, which stand as evidence of that fact, do not "cause" the deprivations. Rather, both the detainer and any deprivations petitioner may experience are caused *by* the intervening conviction.

C. Any deprivations that can be attributed to the detainer and warrant do not entail liberty or property. Even the loss of freedom occasioned by a final revocation of parole is not a loss of "liberty." Petitioner was deprived of his constitutional interest in his personal liberty when he was convicted in 1962 and sentenced to 10 years' imprisonment. He was paroled without serving all of that imprisonment. True, the grant of parole recreated a "liberty" interest, but the new interest has only the dimensions defined by statute. It is subject to defeasance on such terms as the statute establishes. The federal statutes provide that the liberty interest of a parolee can be withdrawn upon conviction for a crime committed while on parole. Once the fact of such a crime has been established, the statutory liberty interest is at an end. The parolee retains not "liberty," but the opportunity to call upon the Parole Commission's discretion not to revoke his parole.

No particular fact or set of facts could establish an entitlement in petitioner not to have his parole revoked. The decision to do so, once the violation of the terms of parole has been established, is entirely discretionary. In other words, once petitioner was convicted for a crime committed while on parole, his only remaining interest was his hope or expectation that his parole would not be revoked. Self-generated

expectations of this sort are not sufficient to create a legitimate claim of entitlement to remain free on parole, and accordingly the Due Process Clause does not apply. *Meachum* v. *Fano*, No. 75-252, decided June 25, 1976.

Much the same analysis applies to the other deprivations petitioner asserts he is experiencing. Even if mitigating evidence is lost between the intervening conviction and the ultimate revocation hearing, and even if petitioner loses an opportunity to serve his parole violation term concurrently with his intervening sentence, neither loss involves liberty or property because the ultimate revocation itself does not deprive him of liberty or property. If petitioner experiences conditions of confinement less advantageous than those accorded to offenders who are not exposed to future revocation of parole, this too does not amount to a loss of liberty or property because no prisoner has a legitimate claim of entitlement to be housed in particular prisons or take part in particular prison programs. *Meachum* v. *Fano*, *supra*. And if the potential revocation of petitioner's parole were to diminish the probability that he would be paroled from his intervening sentence, this would not deprive him of liberty or property because the desire to be released on parole is no more than a unilateral expectation on petitioner's part. See our brief as *amicus curiae* in *Scott* v. *Kentucky Parole Board*, No. 74-6438, certiorari granted, 423 U.S. 1031.

II

Assuming *arguendo* that the potential future revocation of petitioner's parole presently deprives him of liberty or property, we submit that the procedures used by the Parole Commission afford him "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, slip op. 11, quoting from *Armstrong* v. *Manzo*, 380 U.S. 545, 552. They therefore comport with the Due Process Clause.

The Court held in *Eldridge* that a recipient of disability benefits could temporarily be deprived of those benefits on the basis of a file review, so long as a personal hearing preceded the "final" deprivation. The Parole Commission's procedures are similar to those upheld in *Eldridge*. As soon as a parolee is convicted of an intervening crime, the Commission conducts a file review to determine whether the detainer (which is lodged automatically) should be continued in effect. The parolee is free to submit materials for the Commission's consideration. If, on the basis of that file review, the Commission concludes that a personal hearing would be helpful in making this decision, such a hearing is held. In any other event, however, the Commission reviews the detainer at the end of the intervening sentence and, within 90 days, holds a full adversarial hearing to decide whether parole shall be revoked.

This procedure, we submit, adequately accommodates the interests of society and the parolee. It eliminates any possibility of "error," for it is never

"error" to revoke the parole of one who has been convicted for a crime committed while on parole. The procedures provide the Commission with ample information on which to exercise its discretion in an informed manner. The interim decision to allow the detainer to stand is made on the basis of the facts surrounding the intervening conviction and other material that the Commission may have or that may be submitted by the parolee; in doubtful cases a full oral hearing is held; a full oral hearing always is held before a revocation of parole becomes final. Although it is possible that in a few cases important information may elude the Commission's attention, there is no constitutional need for an immediate personal hearing in every case simply to eliminate that possibility. "[P]rocedural due process rules are shaped by the risk or error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, slip op. 22.

ARGUMENT

The question in this case is whether a parolee is constitutionally entitled to an oral parole revocation hearing promptly after he has been convicted and imprisoned for a new crime committed while on parole. The court of appeals held that he is not, concluding that a parolee is not deprived of "liberty" until the parole violator warrant is executed at the end of the intervening term. Three other courts of appeals agree. *Gray* v. *Sigler*, 532 F.2d 1008 (C.A.

5) (collecting seven other Fifth Circuit cases); *Colangelo* v. *Board of Parole*, 517 F.2d 1404 (C.A. 6); *Reese* v. *United States Board of Parole*, 530 F.2d 231 (C.A. 9), petition for a writ of certiorari pending, No. 75-6703. On the other hand, three courts of appeals have held that *Morrissey* v. *Brewer*, 408 U.S. 471, requires the Parole Commission to hold a prompt, pre-revocation oral hearing after a parolee is convicted of an intervening offense.[7] Two other courts

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[7] *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632 (C.A. 7); *Johnson* v. *Holley*, 528 F.2d 116 (C.A. 7); *Cleveland* v. *Ciccone*, 517 F.2d 1082 (C.A. 8); *Jones* v. *Johnston*, 534 F.2d 353 (C.A.D.C.). Cf. *United States ex rel. Carson* v. *Taylor*, C.A. 2, No. 75-2006, decided July 22, 1976 (some kind of hearing is necessary even after a parolee admits that he violated the terms of his parole). These courts have, however, differed as to the proper timing of the hearing and the consequences of delay.

The Eighth Circuit has concluded that a parole revocation hearing must be held promptly after the detainer has been filed. The Seventh Circuit has held, instead, that the parolee must be offered a hearing within three months "after the parolee's criminal conviction establishes the parole violation" (*Hahn*, *supra*, 520 F.2d at 638 and n. 5). The date on which a parole violator warrant is issued apparently is not pertinent to this analysis. The District of Columbia Circuit, taking still a third position, has held that the Commission must afford a hearing whenever the parolee requests it.

The Seventh Circuit had held (*Johnson* v. *Holley*, *supra*) that if there is excessive delay in holding the hearing, prejudice to the parolee is "presumed" and the warrant must be quashed. In the view of the Eighth Circuit, the parolee is entitled to relief only if he can prove prejudice, and that prejudice can be either loss of an opportunity for a "concurrent" parole revocation or inability to present mitigating evidence that might persuade the Commission not to revoke parole. But cf. *Creech* v. *United States Board of Parole*, C.A. 8, No.

of appeals have taken intermediate positions.[8]

In this case, as in all other cases involving the Due Process Clause of the Fifth Amendment, the threshhold inquiry is whether petitioner has been deprived of "liberty" or "property." Only if such a deprivation has taken place is it necessary to ask what process is due. We argue in Part I that a parolee is not deprived of liberty or property simply because he is exposed to revocation of parole following conviction for an offense committed while on parole. This argument is in two parts. First, we argue that a parolee's exposure to *future* revocation of parole—and that is all that a revocation warrant and detainer represents—is not itself a deprivation of any sort, and that if it is, it does not involve a loss of liberty. That loss occurs, if it occurs at all, only when the warrant is executed and the parolee is taken into the custody of the Parole Commission as a parole violator. Next,

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75-1927, decided June 30, 1976. The District of Columbia Circuit agrees with the Eighth Circuit that the parolee has the burden of proving prejudice, but believes that only a diminution of the ability to present mitigating evidence can be considered prejudicial (*Jones* v. *Johnston, supra,* 534 F.2d at 374-375).

[8] The Third and Fourth Circuits have analogized delay in holding a pre-revocation hearing to pre-accusation delay in criminal cases and to the denial of a speedy trial. They consequently hold that there is no obligation to afford a parolee a prompt hearing uless the parolee first establishes prejudice because of the delay. *Gaddy* v. *Michael,* 519 F.2d 669 (C.A. 4), petition for a writ of certiorari pending, No. 75-5215; *Orr* v. *Saxbe,* 517 F.2d 1399 (C.A. 3), petition for a writ of certiorari pending, No. 75-5594.

we argue that even then no constitutional liberty is lost. Once the parolee is convicted, after a full trial or a plea of guilty, for an intervening offense, every fact necessary to revoke his parole has been established. All that remains is a discretionary decision by the Parole Commission, and no fact or set of facts a parolee could prove would entitle him not to have his parole revoked. Because the decision to revoke is entrusted to the discretion of the Parole Commission, the parolee's interest is no longer a liberty or property interest.

Even if the impending revocation of parole deprives a parolee of liberty or property, however, it does not follow that the Parole Commission's procedures are inadequate. The Commission gives each parolee a file review shortly after he begins to serve his intervening sentence, and it holds an oral hearing whenever it appears, after the file review, that the oral hearing would be useful. As we argue in part II, these procedures fully satisfy the requirements of the Due Process Clause.

I

THE EXPOSURE TO REVOCATION OF PAROLE CREATED BY AN INTERVENING CONVICTION DOES NOT DEPRIVE THE PAROLEE OF LIBERTY OR PROPERTY

A. The Procedural Protections Of The Due Process Clause Apply Only To Proceedings That Deprive An Individual Of Liberty Or Property

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action deprives an individual of "liberty" or "property."[9] Accordingly, this Court, in evaluating claims of right to procedural due process, has been scrupulously careful to identify the nature of the underlying substantive interests at stake in order to determine whether those interests were subsumed under either "liberty" or "property."

Perhaps the best example is *Meachum* v. *Fano*, No. 75-252, decided June 25, 1976. Fano and other prisoners had been assigned by state authorities to a particular prison. Because of allegations of misconduct, they were transferred to other prisons and subjected to more onerous confinement. They argued that they were entitled to a hearing similar to that

[9] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

found necessary in *Wolff* v. *McDonnell*, 418 U.S. 539, for loss of statutory good time credits. The Court agreed that the prisoners possessed an "interest" in the place of their confinement, in the sense that the transfer may have subjected them to "grievous loss." But it rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause" (slip op. 8-9). The Court held instead that a convicted prisoner "has been constitutionally deprived of his liberty to the extent that a State may confine him and subject him to the rules of the prison system" (*id.* at 9). As in *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571:

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.

The Court then determined that the prisoners' interest—their desire to retain certain favorable conditions of confinement—was neither a liberty nor a property interest because of the wide discretion vested in prison officials to transfer an inmate for any or no reason. Because that discretion had not been fettered by statute or rule, the Court held, the Due Process Clause did not apply. See also *Montanye* v. *Haymes*, No. 74-520, decided June 25, 1976; *Bishop* v. *Wood*, No. 74-1303, decided June 10, 1976; *Paul* v. *Davis*, No. 74-891, decided March 23, 1976.

Meachum, *Montanye*, *Bishop*, *Paul* and *Roth* illus-

trate the principle that although grievous loss may be a necessary condition to the invocation of procedural due process protections, it is not a sufficient one: the substantiality of an interest does not by itself mean that the interest involves "liberty" or "property." To the contrary, a lawful judgment of imprisonment withdraws the defendant's interest in "constitutional" liberty for the duration of the sentence. He can have a residual liberty or property interest only to the extent that such an interest has been conferred by statute or rule. See also *Arnett* v. *Kennedy*, 416 U.S. 134; *Goss* v. *Lopez*, 419 U.S. 565, 572-576.

B. The Issuance Of A Parole Violator Warrant Does Not Inflict Any Deprivation On A Parolee

As the Court recognized in *Morrissey* v. *Brewer*, *supra*, parole is a statutory creation. A prisoner's constitutional interest in his personal freedom is taken from him for the length of the sentence by a judgment convicting him of crime. Once he is released on parole however, he acquires a statutory form of conditional liberty. In the federal system parole can be revoked only if the parolee violates the terms and conditions of his release. A parolee thus has a liberty interest in remaining free so long as he observes these conditions. The limitations on the power to revoke—the "implicit promise that parole will be revoked only if he fails to live up to the parole conditions" (408 U.S. at 482)—are the source of the parolee's interest.

One condition of parole is that the parolee not commit additional crimes while on parole. See 90 Stat. 225, 18 U.S.C. 4209(a). This condition is so important that revocation of parole is almost automatic if a parolee is convicted of a crime committed while on parole. The Parole Commission's policy is that, "in the absence of substantial mitigating circumstances" parole shall be revoked and the "term of a parolee convicted of a new offense subsequent to release on parole shall run consecutively to any term imposed for the new offense" (28 C.F.R. 2.47(c), App. A, *infra*, p. 13a). There is no "implicit promise" that a parolee can hope to remain on parole after being convicted of additional crimes. The promise is to the contrary.

The issuance of a parole violator warrant, and its lodging as a detainer at the place where the parolee is held for his intervening crime, are the statutory response to an intervening conviction. 18 U.S.C. 4213 (b), App. A, *infra*, p. 2a. The warrant and detainer do not themselves deprive a parolee of anything. They represent no more than a statement by the Parole Commission that there may be sufficient cause to revoke parole in the future. They are a statement that the parolee is exposed to a future deprivation. They neither create the exposure nor cause the deprivation.

The return of a parolee to prison is unquestionably a substantial deprivation. The imprisonment that petitioner is serving is not, however, attributable to the warrant and detainer. It is caused by the judgment of conviction and sentence for the intervening crime. A parolee's sentence for an inter-

vening crime fully supports all of the deprivations imposed on him, and the Commission's action adds nothing to that loss.

The warrant and detainer do not create even the potential for deprivation; the potential is created by the intervening conviction, not by the almost mechanical administrative response to it. In short, the warrant and detainer deprive a parolee of nothing. There is no deprivation until his parole is actually revoked. This alone distinguishes this case from *Morrissey* v. *Brewer, supra,* and *Gagnon* v. *Scarpelli,* 411 U.S. 778, which dealt with the need for hearings to subject a parolee to additional imprisonment.

Petitioner strenuously argues, however, that he is suffering present deprivations because of the possibility of future revocation of his parole. Assuming that petitioner could establish the factual foundation of his claims after a suitable hearing, we now turn to the question whether these deprivations involve liberty or property.

C. None Of The Possible Deprivations Suffered By Petitioner Involves Liberty Or Property

Three sorts of interests of a parolee arguably are implicated when he is exposed to a future revocation of parole. The first of these is the actual retaking and confinement as a parole violator. The second is the potential effect on the ultimate revocation decision that may be caused by lapse of time between the intervening offense and the revocation decision. The third is the alterations in conditions of confinement during the intervening sentence that may be atributable to the possibility of future parole revocation. We deal with each of these in turn.

1. *The future retaking and confinement as a parole violator.*

This case is fundamentally different from both *Morrissey* v. *Brewer, supra,* and *Gagnon* v. *Scarpelli, supra.* In *Morrissey* a parolee, and in *Gagnon* a probationer, were charged with violating the terms of their release; although they disputed the existence of a violation, their releases were revoked and they were imprisoned solely on account of the disputed violations. In both cases the Court held that certain procedural safeguards were necessary to resolve the factual disputes. In the instant case there is no such factual dispute. What is more, petitioner is not now subjected to revocation of his parole; he is now subjected only to the possibility of revocation, in the future.

The possibility of revocation of parole created by the conviction for a crime committed while on parole is just that—a possibility. No additional imprisonment occurs until the warrant is executed and the Commission retakes the parolee as a violator.[10] No deprivation occurs until that time; no hearing is re-

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[10] A parole violator warrant is "executed" when the parolee is retaken and returned to the Commission's custody. 18 U.S.C. 4213(d), App. A, *infra,* p. 2a-3a, provides that any federal official "authorized to serve criminal process * * * shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner or to the custody of the Attorney General * * *."

quired until that time. Cf. *Anderson* v. *Corall*, 263 U.S. 193, 196.

It might be argued in response that the Constitution, which requires a pre-deprivation hearing for loss of certain property interests (*Goldberg* v. *Kelly*, 397 U.S. 254; *Fuentes* v. *Shevin*, 407 U.S. 67), surely requires no less when physical restraints are at stake. It is not clear that this is so. *Morrissey* required only a prompt post-deprivation hearing. See also *United States* v. *Watson*, 423 U.S. 411; *Gerstein* v. *Pugh*, 420 U.S. 103 (a prompt post-arrest hearing is a reasonable protection of liberty interests). But however that may be, petitioner has received a pre-deprivation hearing. He was convicted of the crimes of manslaughter and second degree murder upon his pleas of guilty in open court. This judicial proceeding, which could at petitioner's option have been a full trial, establishes the necessary foundation for the ultimate revocation of his parole. The Constitution should not be interpreted to require still a second pre-deprivation hearing.

There is another reason why there is no need for a pre-revocation hearing: the revocation itself does not deprive the parolee of liberty or property. The intervening conviction fully justifies the revocation of parole. All that remains is a discretionary judgment, and that discretionary judgment does not implicate liberty or property.

The Court recognized in *Morrissey* that each decision to revoke parole involves two questions. The first is "a wholly retrospective factual question: whether

the parolee has in fact acted in violation of one or more conditions of his parole" (408 U.S. at 479-480). Only if a violation is found does the second question arise; this question "involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts" (*id.* at 480).[11] Petitioner's plea of guilty to manslaughter and murder established the answer to the first question, and he cannot relitigate that answer (*id.* at 490). The

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[11] The distinction between the factual determination whether the conditions of parole have been violated and the discretionary power to revoke parole was recognized by Congress when it enacted the original parole act. During hearings it was noted that the language of the bill provided that the Parole Board could "in its discretion revoke and terminate such parole or modify the terms and conditions thereof." Hearing on S. 870 and H.R. 23016 (Parole of United States Prisoners before a Subcommittee of the House Committee on the Judiciary, 61st Cong., 2d Sess. 37 (1910). The Committee believed, however, that terminations should not be in the "absolute discretion" of the Board but should be conditioned on some violation of the terms of release. *Ibid.* A limitation on the exercise of discretion was incorporated into the bill by the joint conference committee that drafted the final version, 36 Stat. 820:

> Sec. 4. That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof *shall have reliable information that the prisoner has violated his parole*, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner. [Emphasis added.]

This qualifying language was retained in the Act until 1948, when it was deleted as "obsolete." H.R. Rep. No. 304, 80th Cong., 1st Sess. A188 (1947).

plea of guilty also established "accurately how many and how serious the violations were" (*id.* at 480). In *Morrissey* itself the Court held that if the record on remand established that the parolees had violated the conditions of their release, "that would end the matter" (*id.* at 490).

Once it has been established that a parolee has committed a crime while on parole, the revocation decision is entrusted to the Parole Commission's discretion. It entails the "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Processs*, 45 Minn. L. Rev. 803, 813 (1961). No particular fact or set of facts is determinative; nothing the parolee could prove would any longer set up an entitlement to have the Commission place trust in his character or not to revoke his parole. Because the process is entirely discretionary once the violation of the terms of parole has, as here, been established beyond cavil, petitioner has no further liberty or property interest that must be the subject of further hearings.

Once the violation of the terms of parole has been established, the parolee's interest in avoiding revocation arises only from his own hopes or expectations. It has no support in any statute or rule.[12] This Court

[12] Petitioner cites (Br. 20 n. 18) a 1971 Board of Parole Policy Paper for a contrary proposition. This Policy Paper has been superseded by 28 C.F.R. 2.47(c), App. A, *infra*, p. 13a. Moreover, the Policy Paper simply stated that information concerning "whether or not the parolee is a good parole risk" will be considered. It did not commit the Board of Parole to take specified actions in response to specified facts; it did not set up a legitimate claim of entitlement for any person not to have his parole revoked.

has rejected many times the argument that a constitutionally protected interest could arise merely from the individual's need, desire, or expectation. As it wrote in *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

And in *Montanye* v. *Haymes*, *supra*, slip op. 6, it wrote:

> [N]o Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another * * * absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events.

See also *Meachum* v. *Fano*, *supra*, slip op. 12-13; *Bishop* v. *Wood*, *supra*, slip op. 3, 6-9. Cf. *Hortonville Joint School District No. 1* v. *Hortonville Education Ass'n*, No. 74-1606, decided June 17, 1976, slip op. 7-9.

When the government has not bound itself to take particular actions in response to particular facts, there is no legitimate claim of entitlement. In *Montanye* and *Meachum* prison officials had discretion to move a prisoner from one place to another, and nothing he could prove would entitle him to remain where he was. In *Roth* and *Bishop* the State had discretion not to continue employing its former employee, and nothing he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts upon which an entitlement depends, the process of making a decision cannot result in the deprivation of any entitlement.

And so it is here. Petitioner's "constitutional" interest in his personal freedom, the interest held in common with free men, was extinguished by his 1962 conviction, which authorized the United States to deprive him of liberty for 10 years. Petitioner was paroled before the end of that term, thus creating a conditional and "statutory" interest in freedom so long as he observed the conditions of his parole. But he forefeited his entitlement to remain free on parole when he was convicted in 1971 of two fresh crimes. Thereupon, petitioner retained only an opportunity to call upon the Parole Commission's discretion not to revoke his parole. And that appeal to the Commission's discretion is a unilateral expectation, not a legitimate claim of entitlement. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

To be sure, the Court indicated in *Morrissey*, *supra*, 408 U.S. at 480, 483-484, that personal hearings on parole revocation would provide information helpful to the parole authorities in exercising their discretion whether to revoke parole. Similarly, in *Gagnon* the Court observed (411 U.S. at 790) that counsel may be advisable at a revocation hearing to marshall mitigating evidence where the violation is admitted or a matter of public record. Taken in context, however, the Court's observations simply point to certain potential advantages of a hearing. In both *Morrissey* and *Gagnon* a hearing was required to establish the fact of violation. Neither *Morrissey* nor *Gagnon* involved a case in which the parolee or probationer had been convicted of an intervening crime; neither *Morrissey* nor *Gagnon* carefully examined this sort of situation to ascertain the source of a liberty or property interest. We therefore submit that these statements need not be and should not be read as establishing the existence of a liberty or property interest that survives the intervening conviction.

We submit, then, that a parolee who has been convicted of a crime committed while on parole has no remaining liberty or property interest that requires another hearing. Congress could establish a rule automatically revoking the parole of all such parolees without further ado. It also could cause that revoca-

tion automatically be served consecutively to the intervening sentence. Surely a liberty or property interest does not come into being simply because Congress, instead of adopting this Draconian rule, has allowed the parolee to appeal to the Parole Commission's discretion not to revoke his parole.[13] We believe that the congressional plan should be accepted.[14]

2. ***Effects on the future decision that may be caused by delay.***

Petitioner contends that two different effects upon the length of time he may be required to serve as a parole violator could arise from the mere fact of delay: (a) "mitigating" evidence may be lost, and with

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[13] See also *Shadbolt* v. *Michigan*, 386 Mich. 232, 235-236:

> There is a valid basis for denying a prisoner accused of violating his parole a hearing in the case of a conviction for a felony. Such a conviction cannot occur before the prisoner has been accorded his full constitutional rights, including right to counsel and right to a speedy and public trial. Such conviction and the constitutional rights available to the prisoner before he is so convicted permit the enactment by the legislature of a conclusive statutory presumption that parole has been violated.

Similarly, 18 U.S.C. 4161 provides that if a prisoner commits an offense or violates prison rules, all or part of his good time may be forfeited. The Due Process Clause, however, would not require a hearing to forfeit good time if it has already been determined in a criminal proceeding or a parole revocation hearing that a prisoner has commited such a criminal offense. See *Swift* v. *Ciccone*, 472 F.2d 577, 578 (C.A. 8).

[14] See S. Conf. Rep. No. 94-648, *supra*, at 35, endorsing *United States* v. *Tucker*, 524 F.2d 77 (C.A. 5), a case holding that no further hearings are necessary once a parolee has been convicted of another crime.

it an opportunity to induce the Parole Commission not to revoke his parole, or to revoke it for a shorter time (Br. 16-21, 23-24); (b) he will lose his opportunity to serve his time as a parole violator concurrently with his intervening sentence (Br. 8-10). Both of these effects commence immediately upon the intervening conviction, petitioner argues, and so require an immediate hearing.

The short answer to this is that if, as we have argued at pages 24-30, *supra*, there is no liberty or property interest in the revocation itself, then these effects upon that revocation add nothing. The Constitution still requires no hearing after petitioner's conviction for intervening crimes.

If the Court should disagree with our analysis, however, it would not follow that these two effects are additional deprivations of liberty or property which themselves support a hearing requirement. Petitioner has not alleged that he has any mitigating evidence that might induce the Parole Commission to be lenient, and so none will be lost. In some other cases, where mitigating circumstances might exist, they would often be preserved in the trial transcript or the transcript of the sentencing hearing for the intervening crime. A "deprivation" of liberty or property could occur only in the unusual case where the parolee claimed that mitigating evidence existed and has not been preserved. It would not apply to every case or give rise to a universal rule, as petitioner apparently contends.

Nor is there anything to petitioner's argument that he is being "deprived" of an opportunity for concurrent service of the intervening sentence and his term as a parole violator. The lack of an automatic oral hearing does not prevent the Commission, after a file review, from dismissing the warrant, thus effectively reinstating a parolee to supervision and causing his time to run concurrently. It does not prevent the Commission, if circumstances warrant, from scheduling an oral dispositional review or revocation hearing and formally revoking parole promptly. Lack of an immediate oral hearing for everyone simply recognizes the inevitable—that concurrent revocation is rare indeed. See 28 C.F.R. 2.47(c), App. A, *infra*, p. 13a; S. Rep. No. 94-369, 94th Cong., 1st Sess. 17 (1975); Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* 370 (1969).

Even the expiration of the intervening sentence before an oral hearing is held does not prevent concurrent service of the violator term. The Parole Commission's task at the end of the intervening sentence is to determine whether it is appropriate for petitioner to serve still more imprisonment. To make that decision, the Commission of course considers the fact that the intervening sentence has been served. The Commission will have the option of ordering petitioner to be reparoled with credit for the intervening sentence (18 U.S.C. 4214(d), App. A, *infra*, p. 7a; 28 C.F.R. 2.52(c)(2), App. A, *infra*, p. 19a), thereby treating the term as a parole violator as if it had run concurrently with the intervening term. A more common device is to revoke parole and reparole the individual as if the intervening sentence had been served as a parole violator, which has a similar effect. 28 C.F.R. 2.21. Indeed, after the expiration of the intervening sentence the Commission is able to make a more informed decision whether the terms should run concurrently. The Fourth Circuit accurately perceived this (*Gaddy* v. *Michael*, *supra*, 519 F.2d at 675; citation omitted):

> To require a hearing at the time of the parolee's conviction on the intervening charge would "frequently operate to the detriment of the prisoner by forcing the Board to exercise its discretion at a point in time when the prisoner's record would argue least favorably for lenient treatment." By delaying the hearing, however, the Board gives the parolee the opportunity, after notice, so to conduct his behavior during service of the intervening sentence as to establish a basis for the withdrawal of the warrant at the conclusion of his intervening sentence.

See also *Reese* v. *United States Board of Parole*, *supra*, 530 F.2d at 235.

Delay therefore does not "deprive" the parolee of the opportunity to serve his terms concurrently. See also *Zerbst* v. *Kidwell*, 304 U.S. 359, 362-363. To the contrary: as *Zerbst* held, concurrency is a matter exclusively within the Commission's discretion, and no facts entitle a parolee to concurrent service of the two terms. Even if a prompt oral hearing were held, the Commission almost always either would defer making a decision or tentatively would decide upon

consecutive revocation. The parolee loses no opportunity because of delay and is deprived of no liberty or property.

3. ***Conditions of confinement during the intervening sentence.***

Petitioner lays stress upon what he asserts are the adverse consequences of the Parole Commission's warrant and detainer upon conditions of confinement during service of the intervening sentence and upon the possibility of release on parole from that sentence (Br. 11-15). We agree with petitioner that the Bureau of Prisons considers the existence of a detainer against a prisoner as one factor among many in making decisions regarding the level of custody, availability of vocational training programs, possible release to half-way houses, and the like. The Bureau's internal operating procedures, some of which petitioner discusses, allow its employees to give a detainer (and the underlying facts that it represents) such weight as, in their discretion, they believe is appropriate. For example, the prospect that a prisoner may face an additional term of imprisonment may reflect upon the wisdom of moving him to an institution for offenders facing only short terms of imprisonment. As in *Meachum* v. *Fano, supra,* however, these potential consequences do not involve a deprivation of liberty or property.

Petitioner has no liberty or property interest in the level of his confinement or his participation in various rehabilitative or educational programs. "That life in one prison is much more disagreeable than in

another does not in itself signify that a * * * liberty interest is implicated when a prisoner is * * * [incarcerated in] the institution with the more severe rules" (*Meachum* v. *Fano, supra,* slip op. 10). A legitimate claim of entitlement to participate in particular prison programs or to enjoy favorable conditions of confinement can arise only by operation of statute or rule. The pertinent federal statute, 18 U.S.C. 4081, grants federal prison officials full discretion over the classification and confinement of prisoners. Not only is there no source in statute or regulation [15] for a legitimate claim of entitlement to

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[15] Petitioner contends (Br. 11) that the Policy Statements of the Bureau of Prisons have created a liberty interest in an inmate's classification in the federal prison system because they limit the Bureau's discretion to classify particular inmates. This is an incorrect characterization of the policy statements. Bureau of Prisons Policy Statement 7300.112 (April 8, 1976) provides for the consideration of numerous factors in making classification and custody decisions. (This Policy Statement, and Policy Statements No. 7500.72 and 7500.14A with respect to detainers, are reprinted as Appendix D, *infra,* pp. 29a-48a). Although many factors are considered, the consideration is subjective. No fact the prisoner could prove would "entitle" him under the Policy Statement to be placed in a particular prison or to be classified in a particular way. The Bureau of Prisons retains full discretion to put any prisoner in any classification. It makes all decisions "on an individual basis" (App. D, *infra,* p. 33a). Petitioner's argument therefore is that the mere establishment of a classification system, and the good faith attempt by prison officials to make informed classification decisions, establishes a "liberty" interest in a particular classification. An identical argument was made by the prisoners in *Meachum* v. *Fano, supra,* and the Court rejected it.

enjoy favorable conditions of confinement, but Congress has expressly declared that federal prisoners have no such entitlement, that the place or nature of incarceration does not depend upon particular inmate-specific facts. Petitioner's expectations or desires in this regard are therefore "too ephemeral and insubstantial to trigger procedural due process protections" (*Meachum* v. *Fano*, *supra*, slip op. 13).

Much the same can be said for petitioner's argument that the detainer may diminish the likelihood of being paroled from the intervening sentence. "The granting of parole has itself not yet been deemed a function to which due process requirements are applicable." *Meachum* v. *Fano*, *supra*, slip op. 14 n. 8. As we argue in our brief *amicus curiae* in *Scott* v. *Kentucky Parole Board*, No. 74-6438, certiorari granted, 423 U.S. 1031, a prisoner's desire to be released on parole is a unilateral expectation rather

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Petitioner also appears to suggest (Br. 12, 16) that he has a liberty interest in a particular classification because the Bureau provides notice and an opportunity for a hearing before making a "disciplinary" change in classification. See Bureau of Prisons Policy Statement No. 7400.5D (July 7, 1975). The same was true in *Meachum*, however; in that case the prisoners were transferred after notice and a hearing, but the Court held that this did not create a legitimate claim of entitlement to remain in a particular prison. The relevant question is whether a rule or statute has created a legitimate claim of entitlement to a classification turning upon provable facts. And petitioner has not claimed that anything in the Bureau's rules or practices "entitles" him to a particular classification in response to particular facts. That being so, there is no liberty or property interest here.

than a liberty or property interest.[16] Accordingly, a decrease in the probability that petitioner will be paroled from his 1971 sentence does not deprive him of liberty or property.

Even if we are wrong in this, the hearing to which petitioner is statutorily entitled upon applying for release on parole gives him ample opportunity to present to the Parole Commission any reason why he should be released on parole. The same Commission that lodged the detainer also decides whether to parole petitioner from the intervening sentence, and it is entirely unrealistic to suppose that a "dispositional hearing" on the detainer is a better vehicle than the statutory parole hearing for determining what the Commission should do about petitioner's case. If the Commission were to grant parole to the intervening sentence, it would be releasing petitioner to its own custody. The question, presented in any forum, is the same: how long shall petitioner remain in federal custody? That can be discussed in one hearing before the Commission as well as in another. Petitioner has had two such parole release hearings (see note 3, *supra*) and has had a full opportunity to present evidence and arguments concerning how long he should remain in federal custody. There is no reason why he should receive still another hearing, this one to discuss the status of the detainer alone, when he has already received two hearings at which this was

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[16] A copy of our brief in *Scott* is being furnished to counsel for petitioner.

a legitimate subject of discussion with the Commission.[17]

II

THE PROCEDURES OF THE PAROLE COMMISSION ARE CONSTITUTIONALLY ADEQUATE TO SUPPORT ANY DEPRIVATION OF LIBERTY OR PROPERTY THAT THE PAROLEE MAY EXPERIENCE

A. Introduction

We have argued in point I that nothing that has happened to petitioner or will happen to him because of the Parole Commission's action deprives him of liberty or property. We now assume, *arguendo*, that liberty or property is implicated and that some process is "due." We submit in what follows that the Parole Commission's procedures fulfill the requirements of due process by offering the parolee "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, slip op. 11, quoting from *Armstrong* v. *Manzo*, 380 U.S. 545, 552. "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all cases." *Mathews* v. *Eldridge*, *supra*, slip op. 26.

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[17] This argument would be unavailable if a parolee's intervening crime were a state or municipal crime. But even then the parolee would be free to present all of the facts of his case to the state authorities. And we submit that any reduction in the probability of his release on parole at the hands of state officials cannot properly be labeled a deprivation by the federal government. Cf. *Paul* v. *Davis*, *supra*.

We have summarized at pages 5-9, *supra*, the procedures used by the Board of Parole and the Parole Commission. Briefly, prior to May 14, 1976, the Board of Parole reviewed a parolee's case promptly after he was imprisoned for the intervening crime. The parolee could submit additional information to supplement the Board's file on him, which was already extensive because of its experience in granting parole and supervising his release. If the Board believed additional information would be helpful, it conducted a prompt oral hearing. If the parolee argued in writing that there were mitigating circumstances in his case, the Board examined the claim. In the rare case when the allegations, if true, might have affected the Board's decision, it held a prompt oral hearing to take the necessary evidence. In every instance the Board reviewed the parolee's case yearly. This review included an oral interview with a social worker if the parolee was confined in a federal prison. And once the parolee was released from the intervening sentence, the Board held an oral revocation hearing within 90 days.

The Parole Commission and Reorganization Act, which applies to all parole decisions after May 14, 1976, makes only two material changes in this procedure. It provides an attorney to help the parolee make his initial written submission to the Commission, and it abolishes the yearly file review. The Act

effectively places the imprimatur of Congress on the procedures the Board of Parole applied to petitioner.[18]

Here, as in *Mathews* v. *Eldridge*, *supra*, slip op. 27, "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the * * * [parole] system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. * * * This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing * * * before * * * [revocation] of his [parole] becomes final." See also *United States* v. *Watson*, *supra*, 423 U.S. at 416, quoting from *United States* v. *Di Re*, 332 U.S. 581, 585: there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable.' "

We begin this analysis from the premise that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481.

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[18] For this reason the Parole Commission and Reorganization Act is deeply implicated here. It governs future proceedings in petitioner's case. See generally *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 711. Petitioner is seeking a judgment that would direct the Commission to handle his case in a manner inconsistent with the provisions of the Act. The Court cannot render such a judgment in petitioner's favor without, at least by implication, declaring the Act unconstitutional.

Resolution of a procedural due process claim requires a discriminating analysis of the relevant interests at stake. *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 167-168 (Powell, J., concurring). Although "*some* kind of notice and * * * *some* kind of hearing" are fundamental requisites of due process (*Goss* v. *Lopez*, *supra*, 419 U.S. at 579), "the nature of the hearing will depend on appropriate accommodation of the competing interests involved" (*ibid.*). This "appropriate accommodation" requires "consideration of three distinct factors" (*Mathews* v. *Eldridge*, *supra*, slip op. 13):

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

We turn to a consideration of these three factors.

B. The Parolee's Interest In An Immediate Oral Hearing Is Not Great

We have discussed at greater length at pages 20-38, *supra*, the nature and extent of the interests that could be affected by delay in holding an oral hearing. Even if these interests amount to a deprivation of liberty or property, the deprivation surely is not substantial. The parolee is imprisoned because of the

intervening sentence, not because of anything the Parole Commission does to him. The prisoners in *Morrissey* and *Gagnon* were subjected to incarceration solely because of the alleged violations of the terms of their conditional liberty that involved no intervening criminal conviction. That has not happened here.

C. There Is Almost No Risk Under Present Procedures Of An Erroneous Deprivation

It is hard to see any reasonable possibility of an erroneous deprivation arising under the Commission's procedures. Because petitioner and others like him have been convicted of an intervening crime, revocation of parole *cannot* be "erroneous." There is ample factual justification for the revocation, and only discretion remains. An exercise of discretion may be "uninformed," but it cannot be "erroneous." A risk of error would be introduced only if a parolee were to deny that he had been convicted of an intervening offense. The Commission informs us that when such a claim is made, it reviews the case promptly and, if necessary, holds a personal hearing. But petitioner acknowledges that he was convicted of an intervening offense on his plea of guilty, so this risk of error does not pertain to him.

Moreover, because the justification for the revocation turns upon the existence of the intervening conviction, "the specter of questionable credibility and veracity is not present" (*Mathews* v. *Eldridge*, *supra*, slip op. 22, quoting from *Richardson* v. *Perales*, 402

U.S. 389, 407). The decisions of the Parole Commission are primarily influenced by the nature of the intervening crime, institutional progress reports, the offender's age and prior record, and other documentary and easily verifiable materials. The conviction for an intervening offense establishes beyond peradventure "how many and how serious the violations were" (*Morrissey*, *supra*, 408 U.S. at 480). And the other important factors, although more subjective, can be examined and dealt with in a written proceeding no less accurately than in an oral proceeding. See generally Note, *The Constitutionality of Procedures Afforded Federal Parolees Imprisoned for New Crimes Committed While on Release*, 56 B. U. L. Rev. 379, 399-405 (1976).

The Commission recognizes, however, that it should exercise an informed discretion, and accordingly it has formulated elaborate procedures to obtain information and aid it in making decisions. Every parolee has an opportunity to present evidence bearing on the disposition of the detainer. Most decisions can be made with confidence on the basis of this file review.[19] And, as we have pointed out, whenever the

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[19] Petitioner repeatedly claims (Br. 19 n. 17, 22 n. 20, 23 n. 22) that he was not advised of or accorded a dispositional review. Petitioner had not made such an assertion prior to filing his brief in this Court. Although the record is silent on the question, information in petitioner's parole file contradicts these new assertions. See pp. 3-4, *supra*, and App. C, *infra*, pp. 21a-28a. But however that may be, petitioner would at most be able to claim that the Board of Parole did not follow its own regulations in his case, not that the regulations or statute are unconstitutional. See *New York Civil Service*

material in the file indicates that an oral hearing would be helpful, one is held.[20] The real question presented here, accordingly, is whether it is enough to have procedures designed to provide a personal hearing whenever such a hearing would be helpful, or whether the Constitution requires a personal hearing in every case. We submit that the present procedures

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Commission v. *Snead*, No. 75-805, decided April 26, 1976. If the Court should conclude that the Commission's usual procedures satisfy the Due Process Clause but that less extensive procedures would not, we believe that it would be appropriate to remand this case for an evidentiary hearing to determine what procedures were used in petitioner's case.

[20] This is done in only a few cases, because it is rare that a parolee who has been recently convicted of a new offense will be able to prove mitigating circumstances sufficient to warrant favorable action by the Commission. Indeed, this Court has observed that after a new conviction "mitigating evidence of this kind is not susceptible of proof." *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 787. See also *Reese* v. *United States Board of Parole*, *supra*, 530 F.2d at 234-235:

> Another contention is that the parolee is entitled to present mitigating circumstances. Mitigating circumstances, like beauty, may be found in the eyes of the beholder, and no doubt there are few, if any, suffering penal confinement who do not find such circumstances to explain their own plight. This is not to gainsay that in some cases those circumstances may be sound and constitute convincing material to present to the parole board. There is nothing, however, in either petition before us here suggesting that there are mitigating circumstances or, if so, what they are. It is difficult to imagine just what Reese can claim as mitigating his parole violation crime of first degree burglary, or what Marine can claim as mitigating his parole violation crime of bank robbery.

Petitioner himself has never argued that he has any evidence in mitigation to present.

provide more than ample protection for the interests of the few parolees whose presentation to the Commission would be prejudiced if a full personal hearing were delayed until the expiration of their intervening sentence. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, slip op. 22.[21]

If it were possible to select the "best" time for a personal hearing on parole revocation, that time would not be immediately after the intervening crime. With little to consider except the fact that a parolee has demonstrated that he cannot be trusted to live in society, the Commission would in almost every case decide to revoke parole and to cause the revocation to run consecutively to the intervening sentence. See 28 C.F.R. 2.47(c), App. A, *infra*, p. 13a. The only contribution a parolee could make to the Commission's deliberations would be to argue that lenient treatment would be appropriate. This would be a waste of time in most cases.[22] After the intervening sen-

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[21] See also Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1270, 1281 (1975).

[22] Petitioner observes (Br. 17) that in some cases the parole authorities withdraw the warrant or revoke parole to allow concurrent service of the terms. This is so, but all of the cases discussed in *Jones* v. *Johnston*, *supra*, 534 F.2d at 356 n. 6, involved revocations or withdrawals after file reviews or dispositional interviews held as a result of file reviews. We know

tence has been completed, however, the Commission will have before it the record of the parolee's behavior during the intervening sentence; the Commission then will be able to make a more informed prediction whether the parolee's release would be compatible with the welfare of society.

Finally, we emphasize yet again that petitioner will not be deprived of his freedom without a full personal hearing. The Act guarantees a full adversarial hearing, at which petitioner can have the assistance of counsel, within 90 days after the end of his intervening term. 18 U.S.C. 4214(c), App. A, *infra*, p. 6a. If the decision ultimately is made to revoke petitioner's parole, he will be given a statement of reasons; he will be entitled to seek reconsideration from the Regional Commissioner and to appeal an adverse decision by the Regional Commissioner to the National Appeals Board. 18 U.S.C. 4214(e) and 4215, App. A, *infra*, pp. 7a-9a. These procedures give petitioner a meaningful opportunity to present his case and hold to a minimum the possibility that the Commission ultimately will exercise its discretion in an uninformed manner.

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of no reason to believe that, because it has not adopted the procedures for which petitioner contends, the Parole Commission is "missing" *additional* cases where such action would be appropriate. Petitioner's observations therefore support rather than detract from the utility and fairness of the present system.

An analogy to criminal cases may be instructive. Parole revocation hearings are not "criminal" cases, and the provisions of the Fifth and Sixth Amendments pertinent to criminal trials therefore do not apply. *Morrissey, supra*, 408 U.S. at 480; *Gagnon, supra*. A parolee convicted of an intervening crime and subjected to a "sentence" of revocation of parole therefore certainly can stand in no better position than a person convicted of crime and exposed to a sentence for that crime.[23] The fixing of a criminal sentence is an exercise of discretion (*Dorszynski* v. *United States*, 418 U.S. 424, 431-432; *Townsend* v. *Burke*, 334 U.S. 736, 741; *Blockburger* v. *United States*, 284 U.S. 299), which "does not require a judge to hold hearings and to give a convicted person an opportunity to participate in those hearings." *Specht* v. *Patterson*, 386 U.S. 605, 606; *Williams* v. *New York*, 337 U.S. 241. The prediction made after a constitutionally valid intervening conviction that a parole violator no longer can "live in society without committing anti-

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[23] This analogy is more favorable to petitioner than need be. Revocation of parole is not "punishment" for the intervening crime but a continuation of punishment for the original crime. It does not amount to a "new" sentence. It simply represents the Commission's judgment that the parole violator should complete the "old" one. See *Hall* v. *Bostic*, 529 F.2d 990, 992 (C.A. 4). Because of this difference, mitigating evidence is much less important in parole revocation than it is in a criminal sentencing proceeding.

social acts" (*Morrissey, supra*, 408 U.S. at 480) likewise should require no additional hearing.[24]

D. Substantial Administrative Burdens Would Flow From Requiring Parole Revocation Hearings In All Cases Prior To Expiration Of The Intervening Sentence

"[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed." *Mathews* v. *Eldridge, supra*, slip op. 26. Requiring an immediate hearing will entail substantial expenditure of time and money as well as delay in decisionmaking. Cf. *Arnett* v. *Kennedy, supra*, 416 U.S. at 168 (Powell, J., concurring). "To impose in each * * * case even truncated trial type procedures might well overwhelm administrative facilities in many places and by diverting resources, cost more than it would save in * * * [administrative] effectiveness." *Goss* v. *Lopez, supra*, 419 U.S. at 583.

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[24] There is also an analogy to a claim to "speedy sentencing" in a criminal case. The Court has never held that the Speedy Trial Clause applies to sentencing proceedings. It assumed this *arguendo* in *Pollard* v. *United States*, 352 U.S. 354, only to hold that the delay was not excessive. *United States* v. *Campbell*, 531 F.2d 1333 (C.A. 5), which held that the Speedy Trial Clause applies to criminal sentencing, indicated that a delay of four years between trial and sentence was sufficient to create a duty of further inquiry into the causes and consequences of the delay. But no court has created a *per se* "speedy sentencing" rule anything like the rules of *Hahn, supra; Cleveland, supra;* or *Jones, supra*, that the hearing must be held within 60 to 90 days of the intervening conviction or the filing of a detainer.

The administrative burdens and costs would be significant if a full personal adversarial hearing were required in every case promptly after a parolee was reincarcerated for a new offense. The workload of the federal parole authority has increased markedly in recent years. *1975 Annual Report of the Attorney General* 226. During 1974 the Board of Parole made 19,625 parole decisions of all types; it made 26,038 in 1975, not including 2,357 appeal decisions.[25] A requirement of additional hearings would unnecessarily accelerate this trend.

In an effort to cope with the increasing workload of parole officials and simultaneously to provide fair and equitable parole procedures, Congress carefully designed the new legislation "to make parole a workable process." S. Conf. Rep. No. 94-648, *supra*, at 20. The hearing requirements urged by petitioner would frustrate that Congressional intent. Automatic hearings could not be handled simply by adjusting existing procedures; they would require a fundamental restructuring of the existing administrative system. The Commission employs 30 hearing examiners, who are already overburdened with their existing workload.[26] Although the Commission plans to increase its

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[25] The federal paroling authority has grown from a budget of $860,000 and 56 employees in 1970 to a budget of $3,391,000 and 138 employees in 1976.

[26] Between October 1974 and September 1975 the hearing examiners conducted more than 26,000 hearings. Set forth by

existing staff of hearing examiners by six, this enlarged force will barely be enough to keep pace with existing hearing requirements.

The exact impact of a requirement that prompt personal hearings be held for parolees incarcerated for new crimes cannot yet be precisely assessed; it is fair to conclude, however, that the number of parolees seeking a hearing would be substantial. In August 1975 federal parole authorities had detainers lodged against 644 state prisoners incarcerated in 213 institutions. At approximately the same time, there were 568 detainers lodged against federal parolees

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region and type, they reveal the enormous burden involved in implementing even the present procedures.

Region	North-east	North Central	West	South Central	South-east	Total
Initial Hearings	2,685	2,857	2,292	1,809	2,413	12,056
Pre-Institutional Hearing Reviews	1,330	1,419	1,262	1,127	1,435	6,573
Regular and Longterm Review Hearings	565	1,129	620	594	549	3,457
Special Reviews and Reopen Hearings	135	202	37	82	46	502
Interim Reviews/ One Third Hearings	320	403	395	191	290	1,599
Institutional Revocation Hearings	214	328	259	191	209	1,201
Local Revocation Hearings	35	34	41	10	14	134
Recission Hearings	120	112	116	109	59	516
Total	5,404	6,484	5,022	4,113	5,015	26,038

Source: The First Full Year of Regionalization: A Statistical Summary, Board of Parole (1976).

serving intervening sentences in 20 federal prisons.[27] The limited experience of the Commission in its North Central Region indicates that approximately 90 percent of those parolees will request an immediate personal hearing.[28]

If the Commission were required to conduct such a substantial number of additional hearings in widely-scattered prisons, it would be compelled either to delay those hearings or to defer giving other hearings that now are being handled in a timely manner. Insofar as the burden of delay is borne by the revocation cases, the Commission risks having its detainer being quashed for failure to provide a reasonably prompt hearing. Insofar as the burden is borne by other cases, inmates who are eligible to receive favorable action from the Commission may be temporarily deprived of this consideration. Neither result is desirable.

The Commission instead could conserve hearing examiner time by making its final decision to revoke or not revoke at a hearing held immediately after the

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[27] This information has been supplied by the Parole Commission from unpublished data.

[28] In compliance with the decisions of the Seventh and Eighth Circuits, the Commission has been providing prompt personal hearings in the States covered by those circuits. During the latter part of 1975, 62 federal parole violators were incarcerated in state institutions in the Seventh and Eighth Circuits. As of December 25, 1975, 36 of these parolees had been offered personal hearings; only four declined the offer.

intervening conviction, and by declining to hold another hearing at the end of the intervening sentence. This strategy, however, would sacrifice the Commission's ability to make informed decisions by committing it to a course of action before it could learn how the parolee has behaved during the intervening sentence. This would deny to the Commission the facts that may be the most important to its decision.

An immediate revocation hearing requirement would also entail substantial financial burdens. Although the Commission maintains five regional offices, this decentralization does not appreciably diminish the burden of holding hearings in more than 200 scattered state and local institutions. Hearing officer panels of two examiners would be required to make expensive and time-consuming trips, often to distant correctional facilities that house only one federal parolee.[29]

The alternative of having the Commission delegate its authority to other federal or state officials, as provided by 90 Stat. 220, amending 18 U.S.C. 4203(c)(3), is not desirable. In most instances these officials do not have the training or experience necessary to make such determinations, nor are they familiar with the policies and procedures of the Commission. A delegation consequently would produce an exercise of discretion less informed, and more arbitrary, than the Commission now provides by its file review.

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[29] Of the 213 state and local institutions in which federal parole violators are incarcerated, 115 of these facilities house only one federal parolee.

We submit that the procedures now followed in reviewing detainers are fair. They are the product of extensive experimentation and careful analysis. They should not be found constitutionally wanting on unproven speculation that a prompt hearing in every case will better achieve fairness.[30]

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[30] If the Court were to disagree with our argument that the current procedures are constitutionally adequate, it would be required to consider two problems: first, how prompt must the prompt hearing be; second, what should be the remedy for lack of a prompt hearing?

We have pointed out at note 24, *supra*, that the Court has never set aside a criminal penalty for want of "speedy sentencing." Moreover, in criminal cases a defendant's claim that he has been denied a speedy trial requires a complicated balancing analysis, taking into account the length of the delay, the reason for the delay, prejudice caused by delay, and the accused's demand for a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514. An accused is not deprived of a speedy trial simply because of the passage of time. We submit that the requirement of a prompt parole hearing should be no more stringent than the requirement of a speedy trial. Accordingly, the *per se* rules announced in *United States ex rel. Hahn* v. *Revis*, *supra*, and *Cleveland* v. *Ciccone*, *supra*, requiring a hearing within 60 or 90 days, are unsupported. If the Court holds that there is a duty to provide a prompt hearing of some sort, it should follow *Gaddy* v. *Michael*, *supra*, and hold that the appropriate length of delay depends upon a balancing of the relevant factors.

The question of the appropriate remedy is more difficult. The remedy probably should be designed to redress the deprivations that call for the prompt hearing. For example, if a hearing is necessary because of the effects of the detainer on conditions of confinement, the remedy should be to withdraw the detainer but to leave the warrant undisturbed. If a hearing is necessary in order to afford a parolee an additional opportunity to receive a concurrent revocation of his parole, the remedy should be to credit the parolee with the time he

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys.

AUGUST 1976.

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could have served concurrently, not to prevent the Commission from revoking his parole. (*Strunk* v. *United States*, 412 U.S. 434, which held that the only remedy for the denial of a speedy trial is the dismissal of the indictment, is based upon the Sixth Amendment, and therefore it does not apply to parole revocation.) If a hearing is necessary in order to allow the parolee to present mitigating evidence, then the remedy should be to require the Parole Commission to hold a prompt hearing, resolving all doubts in favor of the parolee and accepting as true any claims that, because of the lapse of time, are no longer objectively ascertainable. These devices, singly or in combination, could eliminate any harmful consequence of delay. Outright dismissal of the violator warrant would never be necessary or appropriate.

APPENDIX A

1. 18 U.S.C. (1970 ed.) 4205 provided:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

2. 18 U.S.C. (1970 ed.) 4207 provided:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

3. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, 2[illegible]30, amending 18 U.S.C. 4213-4215, provides in part:

> § 4213. Summons to appear or warrant for retaking of parolee

(a) If any parolee is alleged to have violated his parole, the Commission may—

(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

(2) issue a warrant and retake the parolee as provided in this section.

(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of—

(1) the conditions of parole he is alleged to have violated as provided under section 4209;

(2) his rights under this chapter; and

(3) the possible action which may be taken by the Commission.

(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or

to the custody of the Attorney General, if the Commission shall so direct.

§ 4214. Revocation of parole

(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

(i) continuation of revocation proceedings is not warranted; or

(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;

(iii) the parolee is not likely to fail to appear for further proceedings; and

(iv) the parolee does not constitute a danger to himself or others.

(B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing

information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

(3) Following the disposition review, the Commission may:

(A) let the detainer stand; or

(B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;

(2) reprimand the parolee;

(3) modify the parolee's conditions of the parole;

(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

§ 4215. Reconsideration and appeal

(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or

reverse the decision within sixty days of the receipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.

4. The United States Parole Board's regulation relating to detainers in effect at the time of the events in this case, 28 C.F.R. 2.53 (1975), provided:

> (a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.
>
> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand;
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision, thus permitting the federal sentence time to run uninterruptedly from the time of

his original release on parole or mandatory release;

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

5. The United States Parole Commission's regulations pertinent to revocation of parole of a person who is convicted of a crime committed while on parole, 41 Fed. Reg. 19337-19339, to be codified at 28 C.F.R. 2.44-2.52, provide:

§ 2.44 Summons To Appear or Warrant for Retaking of Parolee.

(a) If a parolee is alleged to have violated the conditions of his release, and satisfactory evidence thereof is presented, the Commission or a member thereof may:

(1) issue a summons requiring the offender to appear for a preliminary interview or local revocation hearing.

(2) issue a warrant for the apprehension and return of the offender to custody.

A summons or warrant may be issued or withdrawn only by the Commission, or a member thereof.

(b) Any summons or warrant under this section shall be issued as soon as practicable after the alleged violation is reported to the Commission, except when delay is deemed necessary. Issuance of a summons or warrant may be withheld until the frequency or seriousness of violations, in the opinion of the Commission, requires such issuance. In the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be withheld, or a warrant may be issued and held in abeyance pending disposition of the charge.

(c) A summons or warrant may be issued only within the prisoner's maximum term or terms except that in the case of a prisoner released as if on parole pursuant to 18 U.S.C. § 4164, such summons or warrant may be issued only within the maximum term or terms, less one-hundred eighty days. A summons or warrant shall be considered issued when signed and placed in the mail at the Commission Headquarters or appropriate regional office.

(d) The issuance of a warrant under this section suspends the running of a sentence until such time as the parolee may be retaken into custody and a final determination of the charges may be made by the Commission.

(e) A summons or warrant issued pursuant to this section shall be accompanied by a statement of the charges against the parolee, the applicable procedural rights under the Commission's regulations and the possible actions which may be taken by the Commission. A summons shall specify the time and place the parolee shall appear for a revocation hearing. Failure to ap-

pear in response to a summons shall be grounds for issuance of a warrant.

* * * * *

§ 2.47 Warrant placed as a Detainer and Dispositional Review.

(a) In those instances where a parolee is serving a new sentence in an institution, a parole violation warrant may be placed against him as a detainer. Such warrant shall be reviewed by the regional Commissioner not later than 180 days following notification to the Commission of such placement. The parolee shall receive notice of the pending review, and shall be permitted to submit a written application containing information relative to the disposition of the warrant. He shall also be notified of his right to request counsel under the provisions of § 2.48 (b) to assist him in completing his written application.

(b) Following a dispositional review under this section, the regional Commissioner may:

(1) Let the detainer stand and order further review at an appropriate time;

(2) Withdraw the detainer and (i) order reinstatement of the parolee to supervision upon release from custody, or (ii) close the case if the expiration date has passed;

(3) Order a revocation hearing to be conducted by a hearing examiner or an official designated by the regional Commissioner at the institution in which the parolee is confined.

Following a revocation hearing conducted pursuant to this section, the Commission may take

any action specified at § 2.48, including the ordering of concurrent or consecutive service of all or part of any violator term imposed. Such revocation hearing shall be conducted under the applicable procedures at § 2.50, and the parolee may be represented by his own or appointed counsel as provided in § 2.48(b).

(c) It shall be the general policy of the Commission that, in the absence of substantial mitigating circumstances the violator term of a parolee convicted of a new offense subsequent to release on parole shall run consecutively to any term imposed for the new offense.

§ 2.48 Revocation by the Commission, preliminary interview.

(a) *Interviewing Officer.* A parolee who is retaken on a warrant issued by a Commissioner shall be given a preliminary interview by an official designated by the Regional Commissioner to enable the Commission to determine if there is probable cause to believe that the parolee has violated his parole as charged, and if so, whether a revocation hearing should be conducted. The official designated to conduct the preliminary interview may be a United States Probation Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) *Notice and Opportunity to Postpone Interview.* At the beginning of the preliminary interview, the interviewing officer shall ascertain that the Warrant Application has been given to the prisoner as required by § 2.46(b), and shall advise the prisoner that he may have the pre-

liminary interview postponed in order to obtain representation by an attorney or arrange for the attendance of witnesses. The prisoner shall also be advised that if he cannot afford to retain an attorney he may apply to a United States District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing pursuant to 18 U.S.C. § 3006A. In addition, the prisoner may request the Commission to obtain the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the prisoner admits a violation or has been convicted of a new offense while on supervision or unless the interviewing officer finds good cause for their non-attendance. Pursuant to § 2.49(a) a subpoena may issue for the appearance of adverse witnesses or the production of documents.

(c) *Review of the charges.* At the preliminary interview, the interviewing officer shall review the violation charges with the prisoner, apprise the prisoner of the evidence which has been presented to the Commission, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those witnesses in attendance. Disclosure of the evidence presented to the Commission shall be made pursuant to § 2.50(e).

(d) At the conclusion of the preliminary interview, the interviewing officer shall inform the parolee of his recommended decision as to whether there is probable cause to believe that the parolee has violated the conditions of his

release, and shall submit to the Commission a digest of the interview together with his recommended decision.

(1) If the interviewing officer's recommended decision is that no probable cause may be found to believe that the parolee has violated the conditions of his release, the responsible regional Commissioner shall review such recommended decision and notify the parolee of his final decision concerning probable cause as expeditiously as possible following receipt of the interviewing officer's digest. A decision to release the parolee shall be implemented without delay.

(2) If the interviewing officer's recommended decision is that probable cause may be found to believe that the parolee has violated a condition (or conditions) of his release, the responsible regional Commissioner shall notify the parolee of his final decision concerning probable cause within 21 days of the date of the preliminary interview.

(3) Notice to the parolee of any final decision of a regional Commissioner finding probable cause and ordering a revocation hearing shall state the charges upon which probable cause has been found and the evidence relied upon.

(e) Release notwithstanding probable cause: If the Commission finds probable cause to believe that the parolee has violated the conditions of his release, reinstatement to supervision or release pending further proceeding may nonetheless be ordered if it is determined that:

(1) continuation of revocation proceedings is not warranted despite the violations found; or

(2) incarceration pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations, and that the parolee is not likely to fail to appear for further proceedings, and that the parolee does not constitute a danger to himself or others.

(f) Conviction as probable cause: Conviction of a Federal, State, or Local crime committed subsequent to release on parole or mandatory release shall constitute probable cause for the purposes of this section and no preliminary interview shall be required.

(g) Local revocation hearing: A postponed preliminary interview may be conducted as a local revocation hearing by an examiner panel or other interviewing officer designated by the regional Commissioner provided that the prisoner has been advised that the postponed preliminary interview will constitute his final revocation hearing.

* * * * *

§ 2.50 Revocation hearing procedure.

(a) A revocation hearing shall be conducted by a hearing examiner panel or, in a local revocation hearing only may be conducted by another official designated by the Regional Commissioner. In the case of a revocation hearing conducted by such other official or in the case of a revocation hearing conducted by a single examiner pursuant to § 2.47, a recommendation relative to revocation shall be made by the concurrence of two examiners on the basis of a review of the record. A revocation decision may be appealed under the

provisions of § 2.25 and § 2.26, or § 2.27 as applicable.

(b) The purpose of the revocation hearing shall be to determine whether the prisoner has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(c) The alleged violator may present witnesses and documentary evidence in his behalf. However, the presiding hearing officer or examiner panel may limit or exclude any irrelevant or repetitious statement or documentary evidence.

(d) At a local revocation hearing, the Commission may on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocation may be based. Those witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator unless the presiding hearing officer or examiner panel finds good cause for their non-attendance.

(e) All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by permitting the alleged violator to examine the document during the hearing, or where appropriate, by reading or summarizing the document in the presence of the alleged violator.

(f) In lieu of an attorney, an alleged violator may be represented at a revocation hearing by a person of his choice. However, the role of such non-attorney representative shall be limited to

offering a statement on the alleged violator's behalf with regard to reparole or reinstatement to supervision.

* * * * *

§ 2.52 Revocation of parole or mandatory release.

(a) Whenever a parolee is summoned or retaken by the Commission, and the Commission finds by a preponderance of the evidence, that the parolee has violated a condition of the parole, the Commission may take any of the following actions:

(1) Restore the parolee to supervision including where appropriate (i) reprimand (ii) modification of the parolee's conditions of release (iii) referral to a residential community treatment center for all or part of the remainder of his original sentence; or

(2) Revoke parole.

(b) If parole is revoked pursuant to this section, the Commission shall also determine, on the basis of the revocation hearing, whether reparole is warranted or whether the prisoner should be continued for further review.

(c) A parolee whose release is revoked by the Commission will receive credit on service of his sentence for time spent under supervision, except as provided below:

(1) If the Commission finds that such parolee intentionally refused or failed to respond to any reasonable request, order, summons or warrant of the Commission or any agent thereof, the Commission may order the forfeiture of the time during which the parolee so refused or failed to

respond, and such time shall not be credited to service of the sentence.

(2) If the parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by a term of imprisonment, the Commission may order the forfeiture of the time from the date of the parolee's original release to the date of execution of the warrant, and such time shall not be credited to service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. However, in no event shall the violator term imposed under this subsection, taken together with the time served before release, exceed the total length of the original sentence.

(d)(1) Notwithstanding the above, prisoners committed under the Narcotic Addict Rehabilitation Act or the Youth Corrections Act shall not be subject to any forfeiture provision, but shall serve uninterrupted sentences from the date of conviction, except as provided in § 2.10(b).

(2) The commitment of a juvenile offender under the Federal Juvenile Delinquency Act may not be extended past the offender's twenty-first birthday unless the juvenile has attained his nineteenth birthday at the time of his commitment, in which case his commitment shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.

APPENDIX B

Adult Division

[Received Jul. 20, 1972, U.S. Board of Parole]

July 16, 1972
Leavenworth, Kansas 66047

To: Mr. Pace
U.S. Board of Paroles [*sic*]
Washinton [*sic*], D.C. 20537

Dear Sir,

There has been a "detainer" for parole violation with the Record Office here at Leavenworth Federal Prison, I.D. No. 2644-LC. I am requesting that the United States Board of Parole execute this warrent for parole violation so that the time on that sentence can began to run

Any concerning this above matter, will be deeply appreciated.

Sincerely,

/s/ Minor Moody

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE
Washington, D.C. 20537

April 1, 1974

Mr. Minor Moody
Reg. No. 00901-156 Warrant No. 2644-LC
USP. Leavenworth, Kansas

Re: Warrant No. 2644-LC

Dear Mr. Moody:

We have reviewed your case relative to the detainer currently filed against you, based on a U. S. Board of Parole violator warrant.

We regret to have to advise you that it was the decision of the Board, following a dispositional review of your case, that the detainer should remain on file. The Board has indicated it intends to take you into custody as a Federal violator at such time as you are released from the sentence for which you are now confined.

Be advised that the Board is scheduled to review your case again in April, 1975. In order to facilitate this review, institutional authorities are requested to sub-

mit a current progress report during the month preceding the month of scheduled review.

Sincerely yours,

Steve D. Johnston
Parole Executive

By: Charles G. Wright
Case Analyst

CGW/ks

cc:

Warden, USP
Leavenworth, Kansas

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE
Washington

SUMMARY BY CASE ANALYST

DISPOSITIONAL REVIEW

No. on Warrant: 2644-LC
Current Reg. No.: 00901-156

I. Name: Minor Moody

II. Original Sentence Data:

Offense: Rape on Government Reservation

Length of Sentence: 10 years

Date and Type of Release: 4/11/66 PRD

Warrant Issued: 7/13/70

Charges on Warrant Application: Assault & Battery, (2) Larceny

Days Remaining to be Served: 2132

Original Expiration of Term: 2/11/72

III. Current Sentence Data:

Offense: Vol. Manslaughter, 2nd degree Murder

Date and Jurisdiction of Conviction: 12/6/71 Arizona

Length of Current Sentence: 10 years

Place of Current Custody: USP Leavenworth

Current Parole Status: 4/20/72—Cont. & IRH in 3/75

Tentative Release Date: 9/11/77

IV. Nature of Request:

Annual dispositional review

V. Pertinent Prior Record:

Simple assault, A & B, DC CCW

VI. Pertinent Social Factors:

Full blooded Apache; reared by parents, each of whom had arrests for DC, A & B, & liquor violations, 7th grade education, 5/12/58—maimed—murdered wife on 2/14/71—5 children; history of alcohol abuse

VII. Additional Factors:

attending AA, clear conduct

VIII. Recommendation:

Let the warrant & detainer stand

/s/ Greely
(Analyst) (Examiner)

Date 3/27/74

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
UNITED STATES PENITENTIARY
Leavenworth, Kansas

February 13, 1974

MARCH 1974 PAROLE BOARD

PROGRESS REPORT

IRH— PR X ANNUAL REPORT TO BUREAU—

Name: MOODY, Minor Reg. No. 00901-156

Vol. Manslaughter
Offense: 2nd Degree Murder Age: 34

Sentence: 10 Years Begin: 12-06-71 Months Served: 26 (248 Days Jail Credit)

Days EGT: 98 Days FGT: — Tentative Release: 9-11-77

Last Board Action and Date: 4-20-72—Continue with Institutional Review Hearing in March 1975.

CURRENT OFFENSE

Official Version: On December 6, 1971 in the District of Arizona, Moody was sentenced to a 10 year (a)(2) term for the offense of Voluntary Manslaughter and Second Degree Murder on a Government Reservation. The facts in this case indicate that during the early morning of February 14, 1971,

Moody, while under the influence of alcohol, shot and killed his wife at their residence located at Ft. Apache, Timber Co., Sawmill Housing Area, in Navajo County, on the Fort Apache Indian Reservation. After shooting his wife he drove his pickup to a place called Seven Mile which is five miles south of White River, Arizona to the home of Percy Falls, his father-in-law and after threatening his wife's sister, shot and killed Priscilla Cecilia Smith, a 34 year old female Apache Indian. The weapon used in these offenses was a 357 Magnum revolver.

Offender's Explanation: During the course of interview with Moody prior to the preparation of this report he did not make any statement regarding the charge. He indicated that his statements regarding this offense was contained in the file and if I wanted to see it, I would have to check the file. He appears to be nonremorseful for having become involved in this offense. He exhibited a nonchalant attitude regarding both the manslaughter charge and the 2nd degree murder charge.

Codefendants: None.

BACKGROUND

Prior Record: Moody has an extensive prior arrest record dating back to 1959 at age 20. His arrest record includes many arrests for assaults and public drunkenness. It appears that he has a great propensity for violence and has served one prior felony com-

mitment for the offense of rape. It appears that he has an obsession for weapons as he has been arrested on several occasions for possession of a dangerous weapon. It appears that most of his problems are linked to overindulgence in alcoholic beverages.

Detainers: There is on file a detainer from the US Board of Parole, with the charges being Parole Violation.

Past History: Moody is a 34 year old offender who was born at White River, Arizona on April 11, 1939, the oldest of eight children born to Apache parents. Moody states that he enjoyed a harmonious relationship with his parents. Available information indicates that the parents drank heavily and during the periods of intoxication, became very assaultive. It appears that Moody's whole family frequently overindulged in alcoholic beverages. He stated that he entered school at the normal age of six and dropped out after completing the 7th grade. He states that he has not had any formal education since that time. He has no history of military service. He states that most of his employment has been as a ranch hand and as a common laborer at a sawmill in that area. He has been married on one occasion and states that five children resulted from this union. His wife was the victim in this instant offense.

INSTITUTIONAL PROGRESS

Goals: When initially committed Moody was programmed for a plan that included participation in

Alcoholics Anonymous program to help him gain control over his drinking problem. He has been regularly attending the AA program and is an active member.

Institutional Adjustment: Since the completion of the last progress report, Moody has maintained a Clear Conduct Record. At the present time he works in the Federal Prison Industries where he is employed in the Brush Factory. He is on first grade pay and is averaging approximately $80 per month. Work reports submitted for this quarter indicate that he is regular in attendance, gets along well with his peers, accepts instruction and responsibility and completes them in an orderly manner. Moody states that besides participating in the AA group he attends the Indian Cultural Group regularly and is presently serving as a secretary of the Indian Cultural Group.

Physical and Mental Health: Moody appears to be in good physical condition with limitation of leg impairment which is a birth defect. He appears to not be suffering from any serious psychiatric illness.

Residence: White River, Arizona
USPO: Prescott, Arizona

Recommendation: The Committee feels that the warrant should not be executed.

Completed by: D. B. Tolefree, Senior Case Manager

vcl

APPENDIX D

Federal Prison System Washington, D.C. 20534

Number 7300.112
Date 4-8-76

POLICY STATEMENT

SUBJECT: CUSTODY CLASSIFICATIONS

1. PURPOSE. The purpose of this issuance is to set forth the criteria for the assignment of custody classifications and provide general standards in Bureau of Prisons institutions.

2. DIRECTIVES AFFECTED. The following Statements are affected:

   a. Policy Statement 7300.12D—Inmate Furloughs

   b. Policy Statement 7300.13E—Delegation of Transfer Authority

   c. Policy Statement 7500.20B—Work/Study Release Policies and Procedures

   d. Policy Statement 7500.25B—Inmate Participation in Community Activities

   e. Policy Statement 20001.1B—Custodial Manual, Chapter 4, Paragraph 422

3. POLICY. It is the policy of the Bureau of Prisons to determine the appropriate custody classification to assure the orderly operation and secur-

ity of the institution, community protection, and to provide a means for assigning quarters, details, and community activities. Custody will be considered in this context and not as an instrument of reward or punishment.

4. DETAINERS. A detainer filed on an inmate should not preclude him from custody considerations, but the seriousness of a detainer must be considered when custody reductions are considered. Additionally, when a detainer is originally filed on an inmate, the seriousness of the detainer should be reviewed in respect to custody status. Refer to Policy Statement 7500.72.

5. CUSTODY CLASSIFICATIONS.

a. MAXIMUM CUSTODY. To be assigned to inmates in the Marion Control Unit, per Maximum Control Unit, Policy Statement 7300.80.

b. CLOSE CUSTODY. Implies that the inmate may be assigned to regular housing facilities within the institution and be eligible for all regular assignments and activities under normal supervision, but not for work details or programs outside the secure perimeter of the institution.

c. MEDIUM CUSTODY. Implies that the inmate may be assigned to less secure housing units within the institution and that he is eligible for outside work details under constant supervision of a staff member.

d. MINIMUM CUSTODY. Implies that the inmate is eligible for the least secure housing facilities, including honor camps and farms. He may work on outside details with a *minimum* of *two-hour interval supervision.* Inmates leaving the reservation for funeral trips, bedside visits, medical trips, etc., will be under continuous visual supervision of a staff member.

e. COMMUNITY CUSTODY. Implies that the inmate is eligible for the least secure housing facility, including honor camps and farms. He may work on outside details with a minimum amount of supervision necessary to complete assigned tasks, and is eligible for community programs. An inmate with community custody can be permitted to travel unescorted. Inmates whose presence in the community would depreciate the seriousness of the offense and promote disrespect for the law, because of the nature of the crime, arrest, trial, prisoner status, or record of involvement in criminal activity of a sophisticated nature, should not be classified in this category.

Some factors to consider when assigning custody are: (The following is not all-inclusive, but indicates a general listing of factors commonly used.)

Degree of escape risk; history of violence or assaultive behavior; length of sentence; type of offense; prior record; threats against gov-

ernment officials; members of subversive organizations; and institutional adjustment.

When assigning Minimum and Community Custody, inmates must have demonstrated ability to function with limited or no supervision.

6. ESCORTS. Close, Medium, Minimum Custody inmates leaving the institution for funeral trips, bedside visits, medical trips, etc., must be under escort of staff member(s)—(Close—two staff members, Medium and Minimum—one staff member). These inmates will be given continuous visual supervision.

7. TRANSFERS. Custody of inmates transferred from one institution to another will not be increased unless circumstances warrant an increase and the reasons must be documented.

8. ACTION. Upon receipt of this issuance, each Chief Executive Officer will issue local policy and instructions for implementation of this Policy Statement and review all inmate custody classifications for appropriateness under this Policy.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director
Bureau of Prisons

Bureau of Prisons Washington, D. C. 20537

7500.72

5-8-72

POLICY STATEMENT

SUBJECT: EFFECT OF DETAINERS ON INMATE PROGRAMS

1. PURPOSE. To clarify the Bureau of Prisons position on detainers and their effect on established inmate programs.

2. BACKGROUND. The Bureau of Prisons has been receiving several inquiries regarding its policy on detainers. Attorneys and other interested individuals and agencies have advised us that an inmate's program is often changed when a detainer is lodged against him. It appears that these changes are being initiated on the sole basis of a detainer being filed, regardless of what effect it has on an individual's progress.

3. POLICY. It is the policy of the Bureau of Prisons to look at each detainer filed against a federal offender and make related decisions on an individual basis.

4. ACTION. Each institution should review all material related to a detainer and attempt to determine what implications exist in terms of an ultimate sentence. The lodging of a detainer, in itself, should not have an effect on an individual's program. Each Chief of Classification should con-

vey this information to all those involved in the classification process. It is important to understand that detainers do not effect established programs unless some unusual circumstances also exist.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons
Commissioner, Federal
Prison Industries, Inc.

Bureau of Prisons Washington, D. C. 20537

7500.14A
1-7-70

POLICY STATEMENT

SUBJECT: DETAINERS

1. POLICY

a. It is the policy of the Bureau of Prisons to cooperate with state and local jurisdictions by honoring warrants lodged as detainers at federal institutions and to cooperate with detaining authorities, provided such cooperation does not abridge the rights of the offender or have a seriously adverse effect upon program or security requirements. Because uncertainty as to status can have an adverse effect on our efforts to provide offenders with correctional services, we should encourage detaining authorities to dispose of pending untried charges against offenders in federal custody.

b. The casework staff at all institutions may cooperate with and give assistance to offenders in their efforts to have detainers against them disposed of, either by having the charges dropped, by restoration to probation, or parole status or by arrangement for concurrent service of the state sentence. The degree to which the staff can assist in such matters as these will depend on individual circumstances.

2. DIRECTIVES AFFECTED. Policy Statement 7500.14 (formerly Manual Bulletin 487) is hereby superseded.

3. GUIDELINES. Because cooperation between the various jurisdictions is essential to the efficient functioning of the criminal justice system in the United States, institutions have the responsibility to accommodate state, local, and military jurisdictions whenever possible.

a. Warrants or certified copies of warrants based on pending charges or resulting from unsatisfied sentences in state, local, or military jurisdictions will be construed as detainers. Such detainers will be kept on file at the institution where the offender is in federal custody. Because it is particularly undesirable for detainers to be lodged unexpectedly toward the end of a sentence each institution should have a procedure for contacting jurisdictions which might have a warrant to file. The presentence report will often provide information regarding the possibility of pending charges.

b. The Advisory Assistant or Records Control Supervisor will notify the detaining authorities 60 days prior to the offender's expected release date, in order that arrangements to take custody can be made. Earlier notification will be made if requested by the detaining jurisdiction. For non-federal detainers a carbon copy of the letter of notification, along with the

detainer warrant, should be forwarded to the local sheriff, or other appropriate law enforcement agency, in whose jurisdiction the institution is located. The detaining authorities should be asked to notify the institution and the local law officers of their intention to take custody. If custody is not desired, the warrant may be returned and the institution may proceed with regular release planning. Releases to non-federal detainers should always be made directly to appropriate officers of the state in which the institution is located. Our letter of inquiry, therefore, should also point out that if custody is desired, the detaining jurisdiction must make arrangements for the local sheriff to take custody at the appropriate time.

c. Where parole has been granted to a detainer, the inmate has been released to local authorities and then the detaining authority withdraws the detainer, the inmate should be taken back to the federal institution. Such parole is conditional and when the condition of release to a detainer is not met, the parole should be construed as cancelled. Under these circumstances the Board of Parole should be notified immediately.

d. In those instances where the detaining jurisdiction is in a different state than the institution, it is usually necessary for the offender to sign a waiver of extradition before he may be

released to out of state authorities. The form for such a waiver should be devised in cooperation with local authorities in order that they will be satisfied that it meets local requirements and individual state laws. Each institution is responsible for determining whether its procedure is compatible with those of local law enforcement authorities and with state law. In those cases where a waiver of extradition is required thirty days prior to the date of discharge from federal custody, the Advisory Assistant or Records Control Supervisor will ask the offender whether he is willing to waive extradition. If he agrees to do so, the signed waiver will be filed with the detainer and turned over to the authorities assuming custody. If the offender declines to sign a waiver, the detaining authorities should be notified immediately in order that they may make their decisions with regard to the question of extradition. A waiver of extradition is not required in some instances, for example, for inmates turned over to authorities who are parties to the Interstate Compact on Detainers or for inmates who have already been convicted and are being returned for escape, or parole or probation revocation. Guidance on this issue should be sought from local authorities.

e. Except for offenders whose return to custody is requested in accordance with the provisions

of the Interstate Compact on Probation and Parole, persons on whom detainers have been lodged will ordinarily be released to the custody of the local sheriff for subsequent delivery to detaining authority. Parole or Probation Violators who are returned under the compact may be surrendered directly to the agents of the detaining authority at the institution.

f. Frequently, detaining authorities ask that offenders be transferred to institutions nearer the jurisdiction concerned. In those instances where delegated transfer authority applies, and a writ of habeas corpus has been issued by the court having jurisdiction over the matter at issue, the institution should cooperate whenever possible, with the following constraints:

(1) Such transfers should not be made when they constitute a premature interruption of constructive program participation.

(2) Such transfers should be made only by way of normal prisoner transport methods and should not be made if extra expense to the government is involved.

(3) Such transfers should be approved only to institutions which are suitable from the standpoint of age range, level of criminal sophistication, and security capability. Whenever an exception to this policy appears justified, referrals should be made to the Case Management Branch, Central Office.

(4) In the absence of the issuance of the appropriate writ referred to above, such transfers should not be made when they have the effect of defeating the offender's right to contest extradition. This constraint does not apply when the offender is wanted in the detaining jurisdiction as a result of a prior conviction (including escapes and probation and parole violators). It applies when guilt has not been established and the offender is wanted for purposes of prosecution and then only when the offender indicates that he would elect to contest extradition if given an opportunity to do so.

g. Detainers are frequently filed by a jurisdiction because of relatively minor charges or charges arising essentially out of the same incident that resulted in the federal conviction. Detainers are also sometimes filed despite a federal sentence which more than suffices for the correctional needs of the offender, even when possible pending charges in state and local jurisdictions are taken into account. Finally, detainers are filed at times on bad check charges, the main purpose being recovery for the victim of the offense, the amount of money owed him. The presence of a detainer oftentimes has a restricting effect on efforts to involve the offender in correctional programs. For this reason, caseworkers at federal institutions are expected to assist offenders in their efforts to have detainers disposed of.

h. If the detainer results from an escape from state custody and/or a major unserved state sentence and there is no probability of the detainer being withdrawn, the advisability of attempting to arrange for concurrent service of the sentence should be explored at the appropriate time. Normally, the question of concurrency should be considered at the time the matter of parole is under review. There are exceptions. In any case, questions that may arise about concurrency should be referred to the Case Management Branch.

i. When the detainer is lodged because of pending untried charges, it is of particular importance that the jurisdiction be made to understand our policy of making persons in federal custody available for state prosecution on pending charges whenever possible. (On January 20, 1969, the Supreme Court in Smith vs. Hooey ruled that state charges are open to dismissal on the grounds of failure to grant a speedy trial when a defendant in federal custody requests trial and the state makes no effort to bring him to trial).

j. When the case management staff (classification committee or treatment team) has substantial evidence that prosecution and im-

prisonment on pending charges or return to an institution as a probation or parole violator would injure the offenders chances for successful adjustment in the community it is the responsibility of the staff to assist the inmate in obtaining an appropriate disposition of the charges, or in attempting to arrange for restoration to supervision. Efforts should be initiated by the offender, whose request, where appropriate will be accompanied by a cover letter which contains a summary of his institutional progress, release plans and other facts which will assist the detaining jurisdiction in arriving at a decision. It is important that the information provided be objective. Particular care should be taken to avoid the impression that "pressure" or "influence" is being exerted by federal officials.

k. There are occasions when it is clearly inappropriate for us to directly or indirectly give assistance to an offender in having pending charges dropped or being restored to probation or parole, no matter how well he may have performed while in federal custody. A careful judgment must be made by the staff as to whether the public interest will be served by such action. For this reason, the contents of all letters prepared by institution staff which might have some effect on a decision by state authorities to drop charges, or to

restore an offender to probation or parole, should have the benefit of some form of staff review and be approved at the Chief C & P level or above. Normally the caseworker will agree, whenever requested by an offender, to submit the offender's letter with an accompanying letter outlining institutional adjustment and progress. The offender should be advised that such a letter will be candid and objective, advising the detaining authorities as to good aspects of the offender's adjustment as well as providing information about significant negative factors.

l. The cover letter approach to working with detainers has the advantage of placing the main responsibility on the offender. Thus, it is appropriate in most cases. There are occasions, with illiterate and mentally limited offenders, for example, when the caseworker will need to take the initiative and give the offender a greater measure of assistance.

m. Detaining jurisdictions who want offenders produced in a non-federal court in connection with a criminal prosecution should be advised to make application to the Director, Bureau of Prisons, except where special delegation has been made. On approval of the Central Office the offender may be produced, provided a proper writ of habeas corpus ad prosequendum is issued by the state court before whom the

case is to be tried. When this is done, the state of requesting jurisdiction is required to make arrangements for payment to the United States Marshal a sufficient sum to defray the travel and subsistence expenses of the offender, the deputy U. S. Marshals and/or federal officers responsible for transportation and supervision during the entire time of their absence from headquarters and the offender's absence from the institution.

n. While away from the institution on writ, the offender shall, at all times, including the time of trial, remain in the custody of federal officers, normally deputy U. S. Marshals. The arraignment and trial should be conducted with all possible dispatch and the offenders shall be returned to the institution promptly upon termination of the trial. During the time the federal offender is in the custody of the U. S. Marshal on authority of the writ of habeas corpus issued out of state court, he shall not be allowed to have interviews with any persons who are not directly connected with the trial; he shall not at any time be photographed nor shall he be accorded any privileges not approved for federal prisoners serving sentence.

o. Attachment 1 is a copy of Administrative Form 23 which is used by the Case Management Branch to advise interested jurisdictions

as to our regulations regarding the production of federal prisoners for trial in state criminal courts. The Form may be reproduced and used by the institution in response to appropriate inquiries.

p. If a state or other local non-federal jurisdiction wants a federal prisoner produced in a non-federal court in connection with a criminal prosecution, the proper officer of the state must first make application to the Director, Bureau of Prisons, Washington, D. C. If a private party desires to have a federal prisoner produced in a state court in connection with a civil suit, he must first fully explain the necessity for moving the prisoner. If it is determined to comply with the request of the state or private party, a federal prisoner shall then be produced only pursuant to a proper writ of habeas corpus issuing out of the state court before whom the case is to be tried.

/s/ Myrl E. Alexander
MYRL E. ALEXANDER
Director, Bureau of Prisons
Commission, Federal
Prison Industries, Inc.

Adm. 23
Dec. 1969

Attachment
1-7-70
7500.14A

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
Washington, D. C. 20537

Conditions Governing the Production of a United States Prisoner Upon a Writ of Habeas Corpus Issuing Out of a State Court

If a state or other local non-federal jurisdiction wants a federal prisoner produced in a non-federal court in connection with a criminal prosecution, the proper officer of the state must first make application to the Director, Bureau of Prisons, Washington, D.C. If a private party desires to have a federal prisoner produced in a state court in connection with a civil suit, he must first fully explain the necessity for moving the prisoner. If it is determined to comply with the request of the state or private party, a federal prisoner shall then be produced only pursuant to a proper writ of habeas corpus issuing out of the state court before whom the case is to be tried.

a. The state or requesting party shall make arrangements for payment to the United States Marshal of a sufficient sum of money to defray the expenses of travel from the place in which the prisoner is confined to the place of trial.

b. The sum so paid shall be sufficient to not only pay the expenses of the prisoner but also the necessary expenses of deputy marshals or other officers responsible for his transportation from their regular station of duty to the place where the prisoner is confined, and from that point to the state court, returning the inmate to the place of confinement and then back to official headquarters.

c. The sum paid should be sufficient to pay for subsistence and shelter of the prisoner and the deputy marshals or officers during the entire time of their absence from headquarters.

d. The prisoner shall at all times, including the time of trial, remain in the custody of the federal officers.

e. The arraignment and trial shall be conducted with all possible dispatch.

f. The deputy marshals or other officers shall be permitted to return the prisoner to the place of his confinement promptly upon termination of the state trial.

g. During the time a federal prisoner is in the custody of the marshal on authority of a writ of habeas corpus issued out of a state court, the prisoner shall not be allowed to have interviews with any persons who are not directly connected with the trial; he shall not at any time be photographed; nor shall he be accorded any privileges not approved for a federal prisoner serving sentence.

Unless specifically modified by the Director, Bureau of Prisons, these conditions must be accepted by the applicant before an inmate in the custody of the fed-

eral government may be produced upon a writ of habeas corpus.

It is the responsibility of the marshal to see that the proper writ of habeas corpus ad testificandum, in the case of a witness or a defendant in a civil proceeding, on a proper writ of habeas corpus ad prosequendum, in the case of a defendant in a criminal proceeding, is presented to him as his authority and that satisfactory arrangements for payment of expenses are made before the prisoner is actually removed to the place of trial.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 215796 280

Supreme Court, U. S.
FILED
JUL 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-6632

MINOR MOODY,
Petitioner,

v.

LOREN DAGGETT, Warden,
Respondent.

BRIEF

On the Merits in Support of Respondent, Submitted Amicus Curia by the States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska

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IN THE

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No. 74-6632

MINOR MOODY,
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LOREN DAGGETT, Warden,
Respondent.

BRIEF

On the Merits in Support of Respondent, Submitted Amicus Curia by the States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska

The States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska by their respective Attorneys General, pursuant to Rule 42 of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Respondent in the above-entitled cause.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on March 1, 1976.

CONSENT OF PARTIES

The *amicus curiae* brief is filed pursuant to Rule 42(4) of the Rules of this Court, and thus consent of the parties is not required.

QUESTION PRESENTED

1. Whether a parolee who is incarcerated for a new criminal offense, incurred while on parole, may be afforded a hearing by a parole board on the issue of revocation after the service of the intervening term of incarceration.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICI

Although this case arises under the Fifth Amendment, the issue presented has its origin in *Morrissey v. Brewer*, 408 U.S. 471 (1972), decided under the Fourteenth Amendment. The States of Tennessee, New Jersey, Idaho, Arkansas, Kentucky, California, North Carolina, Oregon, Ohio, Maryland, Illinois, South Carolina and Nebraska [hereinafter "State" or *"amici"*] therefore believe that a resolution of the issue at bar would directly influence their respective parole revocation practices with respect to parolees who commit new crimes beyond the borders of each State.

Many of these parolees are presently incarcerated for new federal offenses in federal institutions and by virtue of conflicting federal court opinions must be afforded prompter revocation hearings than present state law requires. As to these parolees of the respective States, the present case is of direct consequence.

STATEMENT OF THE CASE

The *amici* accept and adopt the "Statement of the Case" contained in Respondent's brief on the merits.

ARGUMENT

Where a Parolee Is Incarcerated for a New Criminal Offense, Incurred While on Parole, a Hearing on the Issue of Revocation May Be Postponed Until After the Service of the Intervening Sentence.

This case represents a review of the conflicting opinions of the various United States Courts of Appeal as to the necessity of according a parolee a revocation hearing while he is incarcerated for a new crime. The several opinions have similar facts except that the warrant charging a parole violation is not always issued by the federal authorities nor is the prisoner in question always serving time in a federal institution. The cases, both federal and state, involve situations where there is a federal warrant on a federal prisoner,[1] a federal warrant on a state prisoner,[2] a state warrant on a federal prisoner,[3] and a state warrant on a state prisoner.[4] While the facts in the case at bar

[1] *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (no prompt hearing required); *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975) (prompt hearing required); *Jones v. Johnston* — F.2d —, 19 Cr. L. 2088 (D.C. Cir. 1976) (prompt hearing required).

[2] *Burdette v. Nock*, 480 F.2d 1010 (6th Cir. 1974) (no prompt hearing required); *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974) (no prompt hearing required); *Reese v. United States Board of Pardons and Paroles*, 530 F.2d 231 (9th Cir. 1976) (no prompt hearing required); *Gaddy v. Michael*, 519 F.2d 669 (4th Cir. 1975) (no prompt hearing required); *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975) (prompt hearing required).

[3] *Hofmann v. Wainwright*, 332 So.2d 18 (Fla. 1976) (no prompt hearing required); *In Re Shapiro*, 537 P.2d 888 (Cal. 1975) (prompt hearing required).

[4] *Betrand v. Hunt*, 308 So.2d 760 (La. 1975) (no prompt hearing required); *Russell v. Cooper*, 211 S.E.2d 655 (S.C. 1975) (no prompt hearing required); *Cooper v. Lockhart*, 489 F.2d 308 (8th Cir. 1973) (prompt hearing required).

only present the first situation, a resolution of the issue involved would be dispositive of the other three, since, for all practical purposes, they are constitutionally indistinguishable.

Under federal statutes,[5] when a parolee is convicted for a new crime committed while on parole the federal authorities invariably charge him with a violation of parole. When the parolee is serving the new sentence in either a federal or state prison, the violation warrant is lodged as a detainer with the institutional warden.[6] While the Parole Commission may, from time to time, consider the propriety of continuing the detainer,[7] the parolee apparently receives a hearing on the issue of parole revocation only some time after the detainer is "executed."[8]

The above procedure parallels the almost universal practice of the states,[9] of issuing a parole violation warrant and lodging it as a detainer where the parolee is convicted of a crime in another jurisdiction.[10] During the interim sentence, the parolee

[5] 18 U.S.C. § 4213, *et seq.*

[6] 18 U.S.C. § 4214(b).

[7] 18 U.S.C. § 4214(b)(2). These reviews may include a "dispositional hearing" where the parolee is confined.

[8] 18 U.S.C. § 4214(d).

[9] The *amici* have made every attempt to ensure that statements made about state parole revocation practices are accurate. However, except for the states actually participating in this brief, the practices can only be described in a general manner due to local variations which may rapidly change due to the fluid nature of the law in this area. See *United States ex rel. Burgess v. Lindsey*, 395 F. Supp. 404 (E.D. Pa. 1975), where an action for monetary damages against a state parole board was dismissed due to a lack of clarity of the decisions as to the board's responsibilities.

[10] In some jurisdictions where the parolee receives "street credit" for the time he is on parole (the federal system denied this credit under former 18 U.S.C. § 4205), there is an additional stage wherein the parolee's sentence is tolled, preventing the sentence from expiring. See *e.g.* Tenn. Code Ann. § 40-3619 and N.Y. Penal Law § 70.40(3)(a).

is not afforded a hearing while he is in the custody of another state or the federal government. Virtually all parole boards will, however, respond to any written questions the parolee might have as to the accuracy of the parole violation charge, which is inevitably based on the new conviction. Thus, if a prisoner denies that he is the same person who was convicted, or asserts that the board is misinformed as to the nature of the crime, the parole board will normally respond to this inquiry to ascertain if the contention is correct. Other than as to correspondence, state procedures make no provision for "dispositional interviews", as such, at the foreign prison. At the conclusion of the intervening prison incarceration, as opposed to the legal expiration of the full term, the detainer warrant is executed whereby the parolee is physically returned to the paroling state for a revocation hearing. At the hearing, the board has the option of revoking parole (which usually means completing at least a portion of the original term in prison) or of refusing to sustain the violation (which usually means the parolee is allowed to resume a parole status). The timing of the revocation hearing is thus dependent for the most part on when the parolee is released from the physical custody of the foreign jurisdiction.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court held that a parolee who was arrested at the direction of the parole authorities and summarily returned to prison was entitled to certain procedural safeguards prior to the termination of his parole. This holding was grounded on the finding that the parolee's status of conditional liberty was a constitutionally protected interest. The parolee could not be deprived of his conditional liberty without notice and opportunity for a hearing where he could contest the allegations that he violated his parole and that the violation was serious enough to warrant revocation. These hearings had to be tendered to the parolee with reasonable dispatch after he was taken into custody, and *Morrissey* suggested that two months was not an unreasonable time.

It is apparent that a parolee imprisoned, not for a violation of his parole, but for a new criminal conviction is under a different type of custody than *Morrissey* contemplated as initiating the revocation process. The convicted parolee under current state procedure has a stake in "conditional liberty" only when he is arrested by the authorities of the paroling jurisdiction at the conclusion of his intervening prison incarceration. Only at that point does the possibility exist that he may be free to resume the conditions of his original parole. Logically, the state would appear to have some duty to tender a hearing to a parolee, at the latest, when the risk of actual imprisonment beyond the term of the interim sentence engenders a related potential for "grievous loss" as in the case of the parolee examined in *Morrissey*. Thus, the present inquiry narrows to whether the state has some duty to tender the revocation hearing at an earlier point during the interim sentence.

This Court has held that "some form of hearing is required before an individual is *finally* deprived of a property interest." (emphasis supplied). *Mathews v. Eldridge*, — U.S. —, 96 S.Ct. 893, 902 (1976). The same consideration has been extended to interests in liberty. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). A hearing once required by due process must be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Morrissey* itself stressed, however, the inherent flexibility of due process, 408 U.S. at 481, which considers "time, place and circumstances." *Cafeteria and Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961).

In *Mathews v. Eldridge*, *supra*, at 903, the Court identified the factors which must be weighed in determining whether existing governmental procedures affecting interests in property could withstand constitutional scrutiny. Although the interest here is in liberty, the same analysis would be appropriate. The three factors are: (1) the private interest that will be affected by the

official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

A

The first factor considers the effect of official action on private interest. The inquiry in the case at bar goes more properly to inaction, although the mere existence of the parole violation charge does have some effect on the parolee during the term of the intervening sentence. This effect goes to the presence of the "detainer" which the parole authorities have against the parolee while he is serving the new sentence. Apparently the presence of this detainer has certain consequences on the parolee which would not otherwise occur absent the detainer.[11] Even assuming that these consequences might be deemed punitive, this ignores the root causes of the "problem", which is not the filing of the detainer but the attributes which the foreign jurisdiction attaches to it.

A parole board filing a parole violation detainer against one of its parolees does so only to keep track of the parolee, who may be transferred to many separate prisons within the penal structure of another state.[12] The detainer assures that when the parolee is released from the physical custody of an institution in another jurisdiction, he will not flee. In this sense, the detainer has the effect of promoting a prompt disposition of the parole

[11] The status of a prisoner with regard to certain privileges or lack thereof is probably due more to the type of crimes committed and length of sentence than to any outstanding detainers.

[12] *Cf. Meachum v. Fano*, — U.S. —, 44 L.W. 5053 (June 25, 1976).

violation charge, since the holding jurisdiction will retain a prisoner but for a short time after he is due to be released.

With regard to the purportedly adverse effects of a detainer, it should be noted that even if the parolee would get a speedier hearing and if his parole were officially revoked the detainer would continue anyway.[13] Considering the probability of non-revocation, discussed *infra*, the chance of removing the detainer is slim indeed. The rare exception where the parolee prevails in an interim hearing should temper somewhat the weight to be accorded to any adverse effects which the detainer may have on the average parolee's interest.[14]

Turning to the parolee's interest in the speedier hearing itself, it is apparent that any administrative hearing conducted long after the event which is the subject of the hearing acts, to some degree, as a limitation on the individual's ability to respond to the charges. When the hearing is concerned with resolving disputed facts, the need for a swift determination is vital. *Morrissey* contemplated the possibility of a preliminary hearing to gather facts while information was still fresh, even before

[13] See *Cooper v. Lockhart*, 489 F.2d 308, 316 n.14 (8th Cir. 1973).

[14] At least one state, Tennessee, has attempted to ameliorate the effects of the detainer prior to the final revocation hearing. Rule 0420-1-1-.18(7) of the Tennessee Parole Board provides that when Tennessee cannot obtain physical custody of a parolee serving time in a foreign institution, the parole detainer is physically withdrawn and the other institution is requested to notify Tennessee sixty days prior to the release of the parolee. This request is in letter form and instructs the custodian "that said letter is not in any way, to be construed as altering any treatment or rehabilitative program which the custodian desires to implement on behalf of the parolee." When Tennessee is finally notified that the parolee is about to be released, the violation warrant is again lodged as a detainer "so that the parolee might be returned to the physical custody" of Tennessee. This procedure was taken from a suggestion in *Cooper v. Lockhart*, 489 F.2d 308, 317, n. 16 (8th Cir. 1973). This might not work for all jurisdictions since credit for time on parole might be keyed to the filing of the detainer.

the final hearing.[15] However, in the type of parole violation hearing conducted where the violation is established by a conviction of record, the parolee cannot realistically contest the fact of a *prima facie* violation. Therefore, a delay of any magnitude in the hearing has no effect on the parolee's interest with respect to the existence of a violation.

Morrissey was concerned, not only with the finding that a violation *per se* may have existed, but also with whether certain mitigating factors as to the propriety of revocation were present. A delayed revocation hearing affects the opportunity of the parolee to offer mitigating factors surrounding the violation, and thus the parolee has some interest with respect to this issue. However, when the violation is grounded on a conviction for a new crime which carries a term of imprisonment, the interest of the parolee in avoiding a potential loss of mitigating factors is at its lowest ebb. Whatever mitigating factors existed with respect to the new crime were obviously presented to the sentencing judge, who just as obviously found them unavailing. The court before which the parolee was convicted had all the facts, both as to the commission of the offense and as to the factors which prompted it. The court had access to pre-sentence reports and probably a more extensive background analysis of the convicted parolee than a parole board has in a revocation hearing. In addition, in *every* case the parolee had the assistance of counsel who zealously argued for the parolee's fitness for a suspended sentence or perhaps only a fine. Yet despite all these factors, the parolee was incarcerated. The mitigation of such a crime before a parole board is therefore almost nonexistent. The parolee's interest in preserving this "evidence," such as it is, certainly is of little consequence.

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[15] A preliminary hearing should not be required where the parolee is already convicted of a new offense and is incarcerated even for violations occurring within the same jurisdiction. *United States v. Tucker*, 524 F.2d 77 (5th Cir. 1975), *cert. denied* 18 Cr.L. 4198 (1976).

On the other hand, the parolee's interest in presenting mitigating factors becomes more important at a revocation hearing held after the intervening sentence. The opportunity in *Morrissey* to present evidence in mitigation was necessary simply because the parole violations there were based on conditions "picayune" in nature.[16] The ability to establish mitigation rose to constitutional dimensions because of the parole board's function of conflict resolution as between the counselor's and parolee's perspectives of the significance of a slight deviation from the rules.[17] In the type of mitigation at issue in the case at bar, conflict resolution as to the import of a violation is no longer a factor immediately after a conviction. The real issue is the propriety of revocation in light of the parolee's institutional record, which can best be demonstrated after serving the interim sentence. Thus, the present procedures may affect the parolee's interest in a favorable rather than a negative manner, by giving him an opportunity to "create" mitigating factors even after the violation occurred.

If the parolee can have a hearing pending the service of the intervening sentence, the possibility may exist that the board might revoke parole and allow him to serve his old sentence concurrently with the new sentence. A delay in the hearing purportedly eliminates this eventuality from ever transpiring. Under many state statutes, however, this is not even a factor since new convictions sustained by parolees are required by law to be served consecutively.[18] But, even in states in which a parole

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[16] Note, *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 98 (1972).

[17] *Cf. Goss v. Lopez*, — U.S. —, 95 S.Ct. 729, 741 (1975):

> "But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." See also *Preston v. Piggman*, 496 F.2d 270 (6th Cir. 1974), involving a "technical" violation of parole.

[18] See *e.g.* Tenn. Code Ann. § 40-3620; Ill. Rev. Stat. Ch. 38 § 1003-3-9(a)(3)(ii); N. J. Stat. Ann. 30:4-123.27.

board has some discretion as to concurrent time, state statutes often contemplate the possibility of credit *ab initio*.[19] *Cf. In Re Shapiro*, 537 P.2d 888, 895 (Calif. 1975):

> The only conceivable prejudice [the state parolee] has suffered from failure to afford a timely hearing is the loss of credit [on his state sentence] for the time he has served at [the federal institution]. Such prejudice can be cured by restoring this credit if the [Board] ultimately decides to reinstate parole.

A parole board at a revocation hearing held after the intervening sentence thus may have available tools with which to deal with various "credit" situations. Moreover, where two states are involved, the parole board in the jurisdiction where the parolee is confined may grant parole to the initial state before the sentence is fully served which has the practical effect of at least a partial concurrent sentence.[20] While practice may vary from state to state, a parole board traditionally has far more flexibility than a court in adjusting time in and out of prison walls. Therefore, in those states where the possibility of concurrent time is a factor, the parolee's interest in maintaining this possibility is not always lost forever simply because the hearing is held at the conclusion of the new prison term.

Delay also allegedly causes the parolee anxiety as to whether his parole will be revoked some time in the future. This concept is borrowed from speedy trial cases where the untried defendant is presumed to be innocent of the crime charged.[21] But where a parolee is convicted of a new crime,

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[19] See *Hofmann v. Wainwright*, 332 So.2d 18, 20 (Fla. 1976).

[20] This is known in the genre as "paroling to a detainer" whereby a person is on parole from one sentence but is serving another in prison at the same time. See *e.g.* Federal Parole Rules § 2.31, 41 Fed. Reg. 19335 (May 12, 1976).

[21] *Smith v. Hooey*, 393 U.S. 374, 379 (1969).

he is no longer presumed to be "innocent" of violating his parole, and the only inquiry remaining is whether it will be revoked or not. This goes to the consequences of the violation and not whether it occurred, and so this is of a lesser dimension than in a criminal case.

B

The second factor to be considered in determining the adequacy of existing procedure is the risk of an erroneous determination and the probable value of a speedier hearing. This Court has previously noted that parole "revocation proceedings may offer less protection from initial error than the more formal criminal process . . ." *Gerstein v. Pugh*, — U.S. —, 95 S.Ct. 854, 867 n. 22 (1975). Where a revocation is based on a criminal conviction, the possibility that error may occur as to the *fact* of a violation is not magnified by the passage of time. Certainly, the parole board in its deliberations can justifiably rely on the prior judicial proceeding and the resulting prison term, both for the existence of a violation and a lack of mitigation. This does not mean that the parole board abdicates its role to a different tribunal but it does suggest that the board can accurately perform its function in due course at any time after the conviction occurred.

One method of ascertaining whether present procedures are prone to error is to consider whether delay might have some effect on the incidence of revocation. In other words, would a prompter hearing increase the chance of non-revocation. The few available statistics show that a parolee receiving a hearing shortly after a conviction occurs has close to a 100% chance of revocation.[22] While figures for revocation based on out-of-

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[22] Kentucky accords parole violators a hearing as soon as they are received at the Kentucky prison. Thus, violations based on in-state convictions are determined more rapidly than convictions oc-

state convictions are almost nonexistent (due to the fact that few hearings have yet been held), it is suggested that parolees confined in distant states would fare no better should their hearings be held at some earlier point in time. The clear implication is that a parolee returned at the conclusion of the intervening sentence would at least have a greater possibility of non-revocation.

There are several factors which might support this conclusion. First, a parole board subjectively would be less likely to revoke, given the fact that the violator has already "paid his debt" for the new crime.[23] Secondly, a parolee with a good institutional record at the foreign prison might be deemed to have demonstrated the lack of necessity for further punitive treatment. The latter factor also considers the nature of the relevant inquiry in parole revocation proceedings. *Morrissey* stated that the function of a parole board in a revocation hearing is to determine whether the parolee should "be recommitted to prison *or* other steps . . . taken to protect society and improve chances of rehabilitation." 408 U.S. at 480 (emphasis supplied). A hearing required to be held prior to the completion of the intervening sentence is thus premature and therefore prone to error, since the parolee is *already* recommitted and the other steps toward rehabilitation are properly within the realm of correctional officials within the prison and not the parole board. It is submitted that a revoca-

curring out-of-state since the parolee does not get a hearing until his return to the Kentucky prison. Of the 168 warrants charging new convictions as the basis for a violation, 100% were revoked in calendar year 1975. See the Appendix *infra*, for a statistical analysis of national revocations.

[23] The subjective element cannot be lightly discounted in parole revocation decision making. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973):

> "In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation."

tion hearing held at the conclusion of the intervening sentence will be more fair and reliable and less likely to be arbitrary than one conducted at some earlier and therefore inappropriate time.

C

Lastly, the validity of existing procedures must take into account the public and governmental interest, including the possible fiscal burden which the requirement of a more prompt hearing might entail. In *Morrissey*, the Court noted that the public interest in revocation proceedings is that they be fair and based on correct information and proper evaluation. This public interest stems from society's stake in the *chance* of the parolee's restoration "to a normal and useful life within the law."[24] But that chance has been reduced to a zero probability by an established violation of that law when the parolee is again imprisoned by virtue of yet another criminal conviction. The public's interest is that the administrative parole board operate in the manner in which it was designed to function by "making a prediction as to the ability of the individual to live in society without committing antisocial acts."[25] This predictive ability can only be exercised when the parolee, now an inmate, has the opportunity once again to assume his role in society. This cannot occur until the parolee has completed his term for the new crime, when he may emerge a very different, hopefully a better, person.

As to those parolees who emerge worse than they were when committed, the state has an important interest in ensuring that such dangerous persons are not at large among the citizenry. If a parole board *must* hear a revocation case prior to the service of a new prison term, the possibility exists, albeit slight, that

[24] *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

[25] *Id.* at 480.

parole might not be revoked. If the parolee subsequently develops serious behavioral problems in prison his freedom at the end of the intervening sentence is assured and the board is powerless to retain him longer to attempt corrective measures.

The above considerations suggest that the parolee's conduct in prison is part of the predictive function of a board in a revocation hearing based on a new criminal conviction. The state's interest is that the predictive function take into consideration everything that has transpired before, during and after a violation. To require, as a matter of due process, that the board conduct a revocation hearing prior to the service of the new sentence is to say that the administrative body must guess how the individual will do in a free society long before that possibility might occur. *Morrissey* does not mandate what is essentially a gamble before all the cards have been dealt.

In addition, the timing of the final hearing as it is presently conducted causes the least burden on the limited fiscal resources of the State. A full *Morrissey* hearing despite its informal characteristics nonetheless requires the presence of numerous people, including possible witnesses, board members, counselors, the parolee and perhaps the parolee's and state's respective attorneys. A hearing conducted prior to the parolee's return to the paroling state can only cause increased burdens on the government and be of little benefit to the parolee.

Several options have been suggested or have been tried in the attempt of various states to accord the parolee an interim sentence hearing. The California Supreme Court, after requiring prompter hearings, suggested that the parolee has the right to waive personal appearance at the final hearing. *In re Shapiro*, *supra* at 894. However, the court's opinion did not provide for the contingency of the parolee declining to waive personal appearance.

No court has suggested that a parolee be physically returned to the paroling state for a hearing prior to his release from another state, nor has any state attempted to do so. No parole board, to the knowledge of the *amici*, has the legal,[26] much less the logistical, ability to perform this interstate transportation feat. While criminal courts have this capability, since it is constitutionally required,[27] a parallel parole procedure would be even more onerous and expensive than the average criminal case. This is because the type of parole violation at issue here occurs, by definition, distant from the paroling state where the forum is located, but in the case of a criminal prosecution the situs of the crime, and thus the trial, is in the prosecuting state.

A parole violation hearing held soon after the offense transpired in a foreign state leaves the parolee with the singular defense of mitigating factors as to his otherwise good record in the distant community. This would therefore necessitate the transportation of not only the parolee with attendant guards, but also such other witnesses as the parolee desired. In addition, everyone would have to be returned; and if parole was revoked, the parolee would have to be brought back at the conclusion of the other sentence to begin the rest of his term in the original paroling state. This cumbersome procedure is thus more complex and expensive than even in a criminal case, and it would be odd for a parolee to have such an advantage when he is not entitled to

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[26] A state parole board has no equivalent of the judicial writ of *habeas corpus ad prosequendum*. The Interstate Agreement on Detainers has never been interpreted as applying to parole violation warrants, See *People v. Diamond*, 229 N.W.2d 857 (Ct. App., Mich. 1975), as to probation violators. Extradition is similarly inappropriate since the holding state is reluctant to agree because extradition offers no assurances that the requesting jurisdiction will return the prisoner. Proceedings under 18 U.S.C. § 4085 are seldom available even for criminal cases. *Smith v. Hooey*, 393 U.S. 374, 381 (1969).

[27] *Smith v. Hooey*, 393 U.S. 374 (1969).

the full panoply of rights due a defendant in a criminal prosecution.[28]

Another possibility for a more prompt hearing would be for the parole board to conduct the hearing in the foreign state.[29] This has been mentioned but rejected by a single court which found the "picture of correctional and parole officers fanning out across the nation" to be absurd. *In re Morales*, 43 Cal. App. 3d 243, 247, 117 Cal. Rpt. 645, 648 (1974). The same court rejected the prospect of the authorities in the other state conducting the hearing by proxy, since the procedures in one state might not comport with procedures in another. This pragmatic consideration has been demonstrated in a brace of Oregon cases which held that hearings conducted by Alaska and Washington were inadequate under Oregon law. *Waltz v. Board of Parole*, 18 Or. App. 652, 526 P.2d 586 (1974); *Vrieling v. Oregon State Board of Parole*, — Or. App. —, 534 P.2d 516 (1975).

While some of the above alternatives may be creative, none offer realistic solutions. The *amici* would emphasize that, whatever burden may be on the federal government in furnishing hearings in state prisons or rural jails distant from the nearest

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[28] In *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.5 (1973), the Court rejected arguments about difficulties in conducting hearings when the violations were inter-state. However, the petitioner in that case was only *arrested* for burglary and was not even tried for the offense by Illinois. Thus, there was a possibility of dispute even as to the existence of a violation. The facts in *Gagnon* and *Morrissey* were therefore identical except for the degree of the alleged violation and its out-of-state characteristic. The case at bar represents far more distinctions than just the degree of violation.

[29] This would be an almost physical impossibility for the Pennsylvania parole board, which must consider each revocation case with a full quorum as opposed to a single member or hearing officer as a matter of constitutional law. *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842, 848 (1973).

regional parole officer, the burden on any individual state is far greater. This goes not only to more modest fiscal resources but also to the actual physical limitations of a state which has agents only within its borders but potential parole violators nationwide.[30] The funds and personnel allocated toward supervising parolees complying with the terms of their release should not be diverted into finding ways of granting speedier revocation hearings to those parolees who have clearly violated their parole and are incarcerated in prison.

D

Morrissey envisioned a revocation procedure which "should not cast a great burden on any state's parole system."[31] The present system with respect to criminally convicted violators accords a proper balance between the parolee's and government's interests and achieves an equitable result compatible with due process. In the last analysis, revocation hearings "[s]imply put, . . . determine whether the parolee will be free or in prison . . ." *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974). The hearing to determine revocation should be required only when the state's and parolee's similar interests in freedom mature and the prospect of prison *vel non* becomes a present reality with respect to the original sentence. No earlier hearing should therefore be of constitutional necessity.

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[30] Kentucky, for example, presently has outstanding detainers for 124 of its parolees incarcerated in 26 other states. In addition, 128 violation detainers are lodged with federal institutions across the country. Letter from Assistant Attorney General Patrick B. Kimberlin, III, of the Office of the Attorney General of Kentucky, June 2, 1976.

[31] *Morrissey v. Brewer*, *supra* at 490.

CONCLUSION

For all the foregoing reasons, the *amici* respectfully urge that the decision of the United States Court of Appeals for the Tenth Circuit be affirmed.

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APPENDIX

APPENDIX

1. Sources of Information

Statistical information for state parole revocation practices is of real benefit only for the period following *Morrissey v. Brewer*, 408 U.S. 471 (1972). Various state and private agencies have compiled information regarding the number of, and reasons for, revocations taken from reports submitted by the several state parole boards. In addition, studies have been conducted to compare the existing procedures with those prior to *Morrissey*. Unfortunately, information on parole practices with respect to the delay and the effect of the delay in revocation hearings is extremely variable and changes with each new court opinion. For the most part, information contained in this Appendix had to be obtained via telephone conversations with parole officers across the country and is accurate only for the period specifically mentioned. The latter caveat is appropriate for all studies done in this area.

2. Other Studies

The American Bar Association's Commission on Correctional Facilities and Services conducted a survey in the fall of 1972 to assess parole board compliance with *Morrissey v. Brewer*. Resources Center on Correctional Law and Legal Services, SURVEY OF PAROLE REVOCATION PROCEDURES, (Washington, D.C., January, 1973). The survey contained responses from forty-five parole boards. In general, the most diverse practice was with respect to the promptness of the final revocation hearing. *Supra* at 6. The study also concluded that there were a number of issues left unresolved by *Morrissey* not the least of which included situations "where the parolee is charged with a new crime . . ." *Supra* at 11. It is noteworthy that the issue

at bar was not even conceived of in the 1973 A.B.A. study and thus no figures were gathered.

The Uniform Parole Reports of the National Probation and Parole Institutes, National Council on Crime and Delinquency Center, Davis, California, has recently published statistics on prisoners paroled in 1973 and how they fared within one year of their release. U.P.R. Newsletter, November, 1975. The survey covered 41 states and the District of Columbia. Of the 24,521 males paroled in 1973, 20,295 were still continued on parole status by the end of one year. 1,058 had absconded from supervision. 2,106 were revoked for technical violations, which included violations of the law in lieu of prosecution. 1,062 or 4% of the total group were recommitted to prison in the same (886) or another jurisdiction (176). The figures do not reflect how many of those recommitted to prison had their parole revoked, but all are subject to revocation. The 4% figure does show, however, that the problem with respect to parolees convicted of new crimes is not insubstantial. It should be remembered that 4% represents new convictions within the *first year* of parole. The number of new convictions for all parolees during the total period of parole is probably much higher.

3. **Current Revocation Statistics**

The following charts show the latest available information on parole revocation by several of the states participating as *amicus curia*. The states were requested to furnish figures for the latest reliable twelve month period divided into type and number of parole violations. Very few states could provide numbers of parolees convicted of new offenses in other jurisdictions as a function of the total revocation population. However, where new felony convictions were sustained by parolees the incidence of revocation is very high for all states. Although the percentage

of "technical" revocations also appears to be great, most states have indicated that only the more serious "technicals" are now charged as a violation. This represents a departure from pre-Morrissey policy of charging virtually all technical violations. Most states have indicated that the policy with respect to new convictions remains as before, and all parolees sustaining a subsequent conviction will be charged as violators.

STATE: Kentucky

Period of Statistics: Jan. 1, 1975 through Dec. 31 1975

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
New Criminal Conviction	252*	168	168	168	0
Technical	N.A.	69	69	69	0
Absconding	N.A.	161	161	161	0
Totals		398	398	398	0

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*This figure represents those convicted in other jurisdictions with detainers. The detainers may have been placed in prior years but were in effect during the above twelve month period.

STATE: Illinois

Period of Statistics: Jan. 1, 1974 through Dec. 31, 1974

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Technical Violations Only	N.A.	227	227	216*	11
Court Recommitments	N.A.	161**	161	161	0
Totals		388	388	377	11

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*Of the 216 technical revocations, 43 were reparoled.

**Of the 161 violations based on new court commitments only 1 was reparoled. The 161 figure represents parolees convicted in other states and returned after serving the sentence. Illinois cannot provide figures as to how many parolees were convicted in other jurisdictions and were returned.

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STATE: Tennessee

Period of Statistics: July 1, 1975 through June 30, 1976

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Convicted Out-of-state	18* w detainers	9**	5	5	0
Absconders	62				
Technical including Absconders received		104	94	90	4
Misdemeanors - in-state		58	58	58	0
Felony convictions in-state		240	240	240***	0
Totals	80	411	397	393	4

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*These were placed during the year, other detainers are outstanding from prior years

**Of these 9 parolees 4 have not yet received a hearing

***Of these 240 revocations, 53 have been reparoled some time during the above period

STATE: Arkansas

Period of Statistics: Jan 1, 1975 through Dec 31, 1975

TYPES OF VIOLATIONS ALLEGED	NUMBER OF PAROLEES .... A: Charged w/ a violation but not in custody of parole state	B: Charged & arrested by parole state	C: Heard by the Parole Board	D: Parole revoked	E: Parole not revoked
Absconders	N A	N A	44	32	12
Other Technical	N A	N A	70	57	13
New Criminal Conviction	N A	130*	130	129	1**
New Conviction Out-of-State	7***				
Totals			254	218	26

Note: The difference between columns B and C represents cases not scheduled for a hearing within the above time frame, charges dropped at preliminary hearing (where held), or other attrition.

N.A. = No figures available

Other comments about state procedure:

*Arkansas does not provide a preliminary hearing for parolees convicted of new crimes so there is no attrition between being charged with a violation and meeting the board for a final hearing

**This conviction was for shoplifting

***The seven detainers were filed within the above year. An unknown number of detainers are outstanding from prior years

Supreme Court, U. S.
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In The

Supreme Court of the United States

No. 74-6632

MINOR MOODY,

Petitioner,

v.

LOREN DAGGETT, WARDEN,

Respondent.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States the Commonwealth of Virginia as Amicus Curiae submits this Brief in support of Respondent. The interest of the Commonwealth of Virginia in this matter rests upon its acute concern with the continued existence and growth of the parole system as an integral part and increasingly more important part of the correctional system. Heavy emphasis is now being placed upon alternatives to incarceration as a result of a shift in emphasis from punishment to rehabilitation. The Commonwealth, while believing that parole procedures must be fair, believes that a proper and delicate balance must be struck and maintained between the parolee and a State.

While the instant case does not relate directly to the States and application of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), to alleged State parole violators housed in out-of-State penal institutions as a result of having committed a criminal offense, the problem faced by the States is similar to that of the United States Parole Board, except that it is more accentuated. Since the decision in *Morrissey, supra*, the States have faced the problem presented in cases where an alleged parole violator has committed a criminal offense in another State and thereafter is sentenced to serve the sentence therefor in that State. The problem has been handled in various ways inclusive of simply deciding to take no action against such parole violators. This, of course, results in unequal treatment inasmuch as alleged parole violators not falling within that class were proceeded against.

Morrissey, supra, did not answer all questions and certainly left open disagreement as to what was constitutionally required in these instances.

The Commonwealth of Virginia, as well as other States, have a very great interest in determination of the question presented in the instant case. Amicus Curiae, therefore, for that reason has filed this Brief.

ISSUE PRESENTED

I.

May An Alleged Parole Violator Incarcerated For The Commission Of A Criminal Offense While On Parole Be Given A Final Parole Revocation Hearing Upon Completion Of Service Of The Sentence Received For Commission Of Such Offense?

RELEVANT CONSTITUTIONAL PROVISIONS

Fourteenth Amendment To The Constitution Of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

I.

An Alleged Parole Violator Incarcerated For The Commission Of A Criminal Offense While On Parole May Be Given A Final Parole Revocation Hearing Upon Completion Of Service Of The Sentence Received For Commission Of Such Offense.

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held the Due Process Clause of the Fourteenth Amendment to be applicable to revocation of parole and further held an alleged parole violator to be entitled to a preliminary parole revocation hearing and to a final parole revocation hearing. This Court stated in 408 U.S. at p. 488: "The (final) revocation hearing must be tendered within a reasonable time after the parolee is *taken into custody.*" (Emphasis supplied.) Neither of the two Petitioners in *Morrissey, supra*, was alleged to have violated terms or conditions of parole involving the commission of a criminal offense. Both Petitioners were "taken into custody" as the result of the issuance of a parole violation warrant.

This Court in *Morrissey, supra*, did not address itself to the issue presented in the instant case. In the instant case, the Petitioner found himself in custody as a result of the commission of a criminal offense and the sentence imposed therefor. The issuance or actual execution of a parole violation detainer warrant at his place of incarceration in no way

placed him "in custody," in the sense it referred to in *Morrissey, supra.*

The requirement that a final parole revocation hearing be held within a reasonable time after a parolee is taken into custody thus is difficult of application to the instant case. The Petitioner suffered no loss of liberty as a result of the issuance or filing of the parole violation detainer warrant, but, instead, suffered loss of liberty only as a result of having been convicted of a criminal offense. Even if the parole violation detainer warrant is considered as having placed the Petitioner in "constructive custody," such custody was of little moment in the face of actual custody and is not that about which this Court addressed itself in *Morrissey, supra.*

Amicus Curiae submits that the issuance or filing of a parole violation detainer warrant against an alleged parole violator who is incarcerated as a result of the commission of a criminal offense should not be held to "trigger" a requirement that a final parole revocation hearing be held within a reasonable time from the filing or issuance of the warrant. If, however, such issuance or filing of a warrant is held to "trigger" that requirement, it is submitted that such a requirement would be met if a final parole revocation hearing were held within a reasonable time subsequent to service of the sentence which the alleged parole violator is serving; in other words, the fact that the alleged parole violator is incarcerated should be of controlling significance in determination of the issue of when a reasonably prompt final parole revocation hearing should occur.

If an alleged parole violator has committed a criminal offense which is a matter of public record, he may not relitigate the same at his final parole revocation hearing. *Morrissey, supra,* at p. 490. He presumably, however, may present evidence which would mitigate against revocation of parole.

To require that a final parole revocation hearing be held soon after the issuance and filing of a parole violation detainer warrant in cases where the alleged parole violation is the commission of a criminal offense, where the alleged parole violator may only present mitigating circumstances, is not reasonable when the burden of such a requirement on the part of the States is considered. This Court in *Morrissey, supra,* clearly took into consideration the burden which would be imposed in setting forth its requirements.[1]

It is submitted, however, that two distinct issues, at first blush, present themselves if the position of Amicus Curiae is accepted. The first is that in certain instances it may well be that the filing of a parole violation detainer warrant against an inmate at his place of incarceration may cause him to be treated differently than other inmates in such institution who do not have parole violation detainer warrants filed against them. Amicus Curiae suggests that this issue may be met by either of two methods: (1) Agreements on the part of the incarcerating institutions to not treat such inmates differently, or (2) the filing of such parole violation detainer warrants upon the date set for discharge of such inmates by the incarcerating institution. Either of these two solutions would negate any chance of inmates' being subjected to prejudice as a result of the filing of a parole violation detainer warrant.

The second issue arises in cases where the final revocation hearing is held so long from the time of the commission of the criminal offense which constituted the violation of parole that the parole violator is unable to present mitigating circumstances which he otherwise would have been able to present, as in the case of the death of witnesses and the like.

---

[1] "The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system." 408 U.S. at p. 490.

It is submitted that in such cases the principles enunciated by this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), should and could be considered by a parole board holding the final revocation hearing. In the event that the parole board, in balancing the principles of *Barker, supra,* should find that the failure to hold a final revocation hearing earlier constituted an unconstitutional delay, dismissal of the initial parole violation warrant would be proper.

It also has been suggested that in the absence of a prompt revocation hearing, a parole violator will loose all chance to have the sentence which he is serving for commission of the criminal offense run concurrently with any additional time he might receive as a result of revocation of his parole.

This suggestion is without merit. When a final parole revocation hearing ultimately is held, a parole board may, and surely would, consider that fact of incarceration as well as anything else which might be helpful to the inmate occurring during his period of incarceration. After considering this, a parole board might well exercise its discretion and not revoke parole, having the same effect as if he had served the sentence and any time which might be revoked as a result of the parole violation, concurrently. A parole violator stands to loose if he must be given a final parole revocation hearing while he is incarcerated. This is for the reason that he will not have time to build a sufficient record while incarcerated to mitigate against revocation of parole later and he will be without the argument that he has suffered enough punishment as a result of having committed the criminal offense. It is a fair assumption that the earlier a final parole revocation hearing is held, the more likely it is that parole will be revoked.

Amicus Curiae urges this Court to hold in accordance with the holdings in *Burdette* v. *Nock*, 480 F.2d 1010 (6th Cir., 1974); *Cook* v. *United States Attorney General*, 488

F.2d 667 (5th Cir., 1974); *Small* v. *Britton*, 500 F.2d 299 (10th Cir., 1974); *Gaddy* v. *Michael*, 519 F.2d 669 (4th Cir., 1975); *Reese* v. *United States Board of Pardon and Parole*, 530 F.2d 231 (9th Cir., 1976); *Gray* v. *Hogan*, 388 F.Supp. 476 (N.D. Ga., 1974); *Russell* v. *Cooper*, 16 Cr. L. 2455 (S.C., 1975); and *Wynsma* v. *Leach*, 536 P.2d 817 (Colo., 1975). Holdings to the contrary should be rejected. See, *Cleveland* v. *Ciccone*, 517 F.2d 1082 (8th Cir. 1975); *Cooper* v. *Lockhart*, 489 F.2d 308 (8th Cir. 1973); *Sutherland* v. *District of Columbia Board of Parole*, 366 F.Supp. 270 (D.C.D., 1973); *Fitzgerald* v. *Sigler*, 372 F.Supp. 889 (D.C.D., 1974); *Arnold* v. *United States Board of Parole*, 390 F.Supp. 1177 (D.C., D.C., 1975); *In Re Shapiro*, 537 P.2d 888 (Cal., 1975); and *United States ex rel. Han* v. *Revis*, 320 F.2d 632 (7th Cir., 1975).

If State parole boards are to be required to give a parole violator who has violated the terms and conditions of parole by committing a criminal offense a final revocation hearing during the time he is serving the sentence for the commission of such offense, where service of the sentence takes place in another State, they will be in a position whereby they must: (1) abandon all hope of revoking such parole violator's parole, or (2) hold the final revocation hearing at such out-of-State institution at great expense in terms of both time and money.

There is at present no method by which to obtain the presence of an alleged parole violator in the State from which he is paroled. The Uniform Detainer Act,[2] for example, is not applicable to such cases. Even if that Act were amended, or another one was in existence, the expense and burden of returning a parole violator to the State from which he was paroled, while not probably insurmountable,

[2] See *Uniform Laws Annotated* (1974), Vol. II, p. 321.

would nevertheless be extremely burdensome, particularly in light of the fact that it is not necessary to protect such parole violator's rights in this manner, as has been argued above.

Whether due process applies to governmental action has been stated to depend upon the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951) (Frankfurter, J., concurring).

Once it is determined that the Due Process Clause applies, whether a particular right is constitutionally required depends upon the significance of the claimed right, the nature of the proceedings, and the possible burden on those proceedings; requirements of due process vary according to the type of proceeding involved. *Hannah* v. *Larche,* 363 U.S. 420 (1960).

In applying the Due Process Clause, there must always be reached a balance. *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). Administrative realities must be taken into account, *Wolff, supra; Morrissey, supra; Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973).

Amicus Curiae suggests that a balance must be struck in the case of an alleged parole violator incarcerated for the commission of a criminal offense in a foreign jurisdiction. Amicus Curiae further suggests that such a balance is struck where the paroling State and the incarcerating State so conduct themselves that the alleged parole violator does not suffer as a result of the existence of a parole violation detainer warrant and when any delay in holding a final revocation hearing is governed by the principles of *Barker, supra.* To require that a final revocation hearing be held while such individual is still incarcerated in a foreign jurisdiction places an undue burden upon the paroling States and tends to overlook administrative realities.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed.

Respectfully, submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Respondent to Phylis Skloot Bamberger, The Legal Aid Society, Federal Defender Services Unit, 509 United States Court House, Foley Square, New York, New York 10007, Counsel for Petitioner and to Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, Counsel for Respondent on July 26, 1976.

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